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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 777

EASTERN AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Atlanta, Georgia
March 9, 1960

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EASTERN AIR LINES, INC.,

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CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Eastern Air Lines, Inc. ("Eastern") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on December 10, 1959, and amended January 7, 1960 and subsequently stayed.

Opinions Below.

The opinions and orders of the Civil Aeronautics Board ("the Board" or "the CAB") are not officially reported, but appear in the printed joint appendix used in the Court of Appeals below (479-519, 640-662).[1]

[1] Unless otherwise indicated, numbers in parentheses refer to pages of the joint appendix.

The opinion of the Court of Appeals, ... F. 2d ..... (D. C. Cir. 1959), 9 Ad. L. Dec. 2d 863 (1959) is printed in Appendix B hereto.

Jurisdiction.

The jurisdiction of this court is invoked under 28 U. S. C. §1254(1) and 49 U. S. C. §646(f).

Questions Presented.

1. May the Civil Aeronautics Board, required by statute (Civil Aeronautics Act of 1938[1] §1005(f), 49 U. S. C. §645(f); Administrative Procedure Act §§8(b), 10(e), 5 U. S. C. §§1007(b), 1009(e)) to make adequate findings on the elements of public convenience and necessity before certificating a new air service (Civil Aeronautics Act of 1938 §§2, 401(d), 49 U. S. C. §§402, 481(d)), certificate a new service in a market and lawfully refuse to make findings measuring the expectable revenues or volume of traffic against expectable costs of operation and capacity in that market?

2. Can the Board in an airline new route case commonly known as an "area proceeding" consider the needs for service between points inside the "area" and points on a "little additional segment outside the area" (App. B, p. 21 hereto) without considering all applications for authority to provide that service as required by the *Ashbacker* doctrine

[1]The Civil Aeronautics Act of 1938, 52 Stat. 977, 49 U. S. C. §§401-705 was replaced in all pertinent parts without material change by the Federal Aviation Act of 1958, 72 Stat. 737, 49 U. S. C. §§1301-1542.

Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U. S. 327 (1945))?

3. Is it lawful for the Board, in airline "new route" proceedings, to announce its determinations, prior to consideration of all relevant and material portions of the record, by "press release", without supporting reasons or consideration of all pertinent and material facts?

Statutes Involved.

This case involves the Fifth Amendment to the Constitution of the United States, sections 2, 401, 1005(f) and 1006(a) of the Civil Aeronautics Act of 1938 (52 Stat. 980, 987, 988, 1023, 49 U. S. C. §§402, 481, 645(f), 646(a), and sections 3(a), 8(b), 10(a), and 10(e) of the Administrative Procedure Act (60 Stat. 237, 241, 242, 243, 5 U. S. C. §§1002(a), 1007(a), 1009(a), 1009(e)). These sections are printed in Appendix A hereto.

Statement of the Case.

This matter arose as a "new route" proceeding before the Board.

Eastern is a certificated air carrier, authorized by the Board to engage in scheduled air transportation between (*inter alia*) St. Louis and Florida and between Memphis, Birmingham, Atlanta and Florida, both routes including intermediate points. Prior to the Board's decision in the proceeding before it (479-519) no other carrier was certificated to serve those routes. However, that order authorized Trans World Airlines, Inc. ("TWA") to operate between St. Louis and Nashville on the one hand and Atlanta and Florida on the other and Delta Air Lines, Inc.

("Delta") to operate between Memphis on the one hand and Birmingham, Atlanta and Florida on the other both in competition with Eastern.

Prior to the institution of the proceeding before the Board, Eastern had applied to the Board on two separate occasions for a route between St. Louis, Kansas City, Los Angeles and San Francisco where TWA operates (11, 15, Supplemental Joint Appendix 4-5) and for a route between Memphis and Kansas City, where Delta operates (11-15). Those Eastern applications have never been set down for hearing.

On March 2, 1956, the Board ordered activation of the *St. Louis-Southeast Service Case* (29-31).[1] Various carriers (including TWA and Delta) then filed applications for St. Louis-Florida authority (Delta also applied for Memphis-Florida authority) and requested that their applications be included in the proceeding. In response to the Board's order, Eastern requested consolidated hearing on its applications, previously referred to, pursuant to which Eastern would be authorized to offer services identical to those proposed by TWA and Delta. Eastern alleged that its applications were "mutually exclusive" within the meaning of the *Ashbacker* doctrine with the Delta and TWA applications (42-45).[2]

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[1] Normally, the Board hears applications in order of filing and delays in processing applications usually result in several years between filing and hearing. The City of St. Louis had filed an application with the Board February 10, 1956 for an additional carrier into the Southeast (19-22). That application became the lead docket in the proceeding, although it was only three weeks old when assigned for prehearing conference. Eastern's applications, previously referred to, were then some three years old, and now, still unacted upon, are over seven years old.

[2] Delta's *existing* Kansas City-Memphis authority, plus its *application* for Memphis-Birmingham authority, combined with its *existing* Birmingham-Southeast authority, permitted Delta to offer Kansas City-Southeast service (which theretofore was not

The Board refused to consolidate Eastern's applications for hearing, but it did include the TWA and Delta applications to duplicate Eastern between St. Louis and Memphis on the one hand and Atlanta and Florida on the other (91-92, 149). Certain applications of Eastern for new service authorizations between points entirely within the "area" of the case were also consolidated for hearing and decision[1] (149-51).

Hearing was held before an Examiner of the Board, and Eastern and other parties filed briefs with the Examiner. Among other things, Eastern requested the Examiner to make findings on the issues of "mutual exclusivity"

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authorized to any carrier). Eastern sought to combine its *existing* Memphis-Southeast authority with its Memphis-Kansas City *application* to offer Kansas City-Southeast service. Similarly, TWA by combining its *existing* West Coast-St. Louis *authority* with its St. Louis-Southeast *application* sought to offer West Coast-Southeast service. Eastern desired to combine its *existing* St. Louis-Southeast *authority* with its St. Louis-West Coast proposal to offer the same West Coast-Southeast service offered by TWA. It should be pointed out that Eastern sought hearings on its applications limited strictly to the services that were offered by TWA and Delta. Each of those carriers proposed to combine existing routes with the applied-for routes for operations between points within the so-called "area" of the case and points outside thereof. Eastern differed only in that Eastern's *existing* authorizations were within the "area" and the applied-for authority was "*outside*" the "area" while TWA's and Delta's *existing* authorizations were *outside* the area and their *applications* were for new authorizations *within* the area. Eastern desired to extend west *from* the Southeast, and TWA and Delta desired to proceed eastward *into* the Southeast. (The "area" of the case was never precisely defined by the Board but it conformed generally to an area circumscribed by a line drawn between St. Louis, Memphis, Birmingham, Atlanta, Tampa, Miami, Jacksonville, Atlanta, Nashville and St. Louis; see, *e.g.*, the Examiner's description of the applications consolidated into the proceeding, at 297-98 of the joint appendix below.)

[1] The Board has generally recognized, as have the Courts, the duty, under *Ashbacker*, to hear all conflicting applications proposing service between points lying within an "area." See, *e.g.*, *Northwest Airlines* v. *Civil Aeronautics Board*, 194 F. 2d 339 (D. C. Cir. 1952); *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F. 2d 17 (D. C. Cir. 1955).

(274-75) created by the inclusion of the TWA and Delta applications in the case and the exclusion of Eastern's applications. The Examiner in his Initial Decision made no findings upon those "mutual exclusivity" questions.

Exceptions to the Initial Decision and briefs were filed with the Board. Eastern asked that the Board make findings upon "mutual exclusivity" (405).

The Board then deferred decision for simultaneous consideration with the *Great Lakes-Southeast Case*, CAB Docket 2396 *et al.* (409-11).

On March 19, 1958, the Board commenced deliberations in the case below, the *Great Lakes* case, *supra*, and others deferred for simultaneous consideration. Deliberations continued on March 25, 26 and 27, 1958 (729-43).

On March 26 and 31, 1958, the Board announced, without supporting reasons and by press release, its determinations to grant TWA a route between St. Louis, Nashville, Atlanta, Tampa, and Miami, and Delta a route between Memphis and Birmingham, there joining Delta's existing routes to Atlanta and Florida, both routes competitive with Eastern (662-63, 666).

On October 2, 1958, the Board released its formalized decision (479-519) giving reasons for the awards to TWA and Delta, previously announced in its "press release" decisions. In general, the Board's formal opinion adopted the Examiner's Initial Decision in concluding that an additional carrier between St. Louis and Florida was required by the public convenience and necessity (485-90, 299-312, 376-81). The conclusions rested upon general observations to the effect that inadequacies had been shown in Eastern's service, that the market had not developed as fast as some other markets, that in some instances, Eastern, the incumbent carrier, had offered older equipment, and that there was a public need for competition in the area. Nowhere,

however, did the Board, or the Examiner, measure the market's potential traffic and revenues against the capacity to be offered or the cost of the operation, to determine whether two carriers could be economically sustained. After deciding that a second St. Louis-Florida carrier should be authorized, TWA was chosen over the other applicants because it could provide the greatest "beyond area" benefits (492-93).

Neither did the Board make any findings on the "mutual exclusivity" issue raised by Eastern as between its excluded application and the application of TWA. (As will be pointed out below, the Court of Appeals held this failure of the Board to be legal error.)

In stating its conclusions as to the Delta award, the Board noted that some civic representatives had complained about Eastern's Memphis-Birmingham services (505, 317, 319). However, the Board made no attempt to balance the traffic potential or revenues against capacity and costs of operation. Neither did the Board make findings as to the mutual exclusivity between Delta's award and Eastern's excluded application, which, if heard and granted, would permit Eastern to provide the same service between Kansas City on the one hand and Birmingham and Atlanta on the other, a question timely and properly raised by Eastern. (As will be pointed out below, the Court of Appeals held that the Board was entitled in this instance to disregard the *Ashbacker* doctrine.)

Eastern and others petitioned the Board for reconsideration, Eastern pointing out (618-19) that operation by two carriers on the St. Louis-Florida routing would be uneconomic, that two carriers could not be economically certificated between the Southeast and the West Coast via St. Louis and therefore that the TWA application was "mutually exclusive" of Eastern's excluded application.

On November 21, 1958, Eastern filed, pursuant to Section 1006 of the Civil Aeronautics Act (49 U. S. C. §646), in the Court of Appeals for the District of Columbia a petition for review (711-43), later amended (744-750), and, as well, a petition for stay of the Board's order. The stay was subsequently denied on December 15, 1958 and the Court of Appeals issued its decision on the review questions December 10, 1959.

Various other parties to the proceeding before the Board also sought review by the Court of Appeals (Delta, 705-710; National Air Lines, Inc. ("National"), 751-758; and American Airlines, Inc. ("American"), whose petition for review was not printed in the joint appendix below).

The Court below overturned the TWA award and held in substance that in an "area" proceeding, it was unlawful for the Board, in light of the *Ashbacker* doctrine, to award a transcontinental route without hearing applications of other carriers for the same transcontinental authority (App. B, pp. B3-B12, B14, B18-B20). With respect to Eastern's complaint that the Delta award violated the *Ashbacker* doctrine in the same manner as the TWA award, the Court stated (App. B, p. B21) that:

> "Eastern's position is, in effect, that the same considerations which apply to the treatment of the transcontinental route problem, as it arose in the *St. Louis Case,* apply likewise to the Kansas City service problem as it arose in that same case. We think they do not. The expansion of an area case by adding a little additional segment outside the area is quite a different thing from awarding a transcontinental certificate in a limited area case. The former is an expansion of a limited case. The latter is a transformation of the real nature of the proceedings. We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment."

Eastern had also urged the Court below to find that the Delta and TWA awards were not based upon proper findings of public convenience and necessity. Eastern argued that sound Board precedent required a balancing of anticipated revenue (or traffic) in the markets at issue against the total costs (or capacity) to be incurred. The Board had made no such findings. The Court did not rule, except perhaps by negative inference, upon Eastern's contention. Rather, the Court stated that there were Board findings that Eastern's service had been inadequate, had not developed the market, that more traffic would result from improved service and there was a need for competition. But it is important to point out that the Court did *not* hold that those were sufficient findings to sustain the awards. Rather, the Court erroneously tied Eastern's contention as to the requirement of balancing revenues (or traffic) against costs (or capacity) to another point made by Eastern—that the Board should have reopened the record to receive current data on Eastern's operations and held that on the facts the Board need not reopen the record. (App. B, pp. B22-B23). Eastern did not so limit its contentions. Eastern's contention is that the Board, in the lawful exercise of its duty and discretion under the Act must, at some time, balance expectable revenues (or traffic) against expectable expenses (or capacity) to determine whether additional carriers will actually serve a useful public purpose responsive to a public need. The Court below erroneously failed to rule upon this contention.

The Court did not pass upon Eastern's contention that the Board unlawfully prejudged the case by announcing by press release its determination to award the TWA and Delta routes, that announcement appearing some six months before the Board issued its formal opinion and order along with supporting reasons for the awards. It was shown

in Eastern's brief to the Court that the traffic data upon which the Board relied heavily in making its formalized findings in the case were *unavailable to the Board at the time of its press release prejudgments*, and therefore could not have served as a basis for the Board's predeterminations. The Board simply took "official notice" of subsequently revealed information to justify *ex post facto* its preconceived results. The Court below did not consider these contentions.

Reasons for Granting the Writ.

Sound, orderly regulation of this Nation's air transport industry is eminently in the public interest, as Congress recognized in enacting the Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958. In 1958 the air lines became the Nation's number one intercity common carriers and the Board expects that an even greater increase in air travel will come with the advent of new jet equipment. (*Annual Report of the Civil Aeronautics Board for 1958*, p. 2). Some 50,000,000 persons flew on commercial air lines in 1958 which were then a $2,900,000,000 business (*Ibid.*).

The outcome of "new route" proceedings before the Board is of grave consequence not only to the airline parties, but also to the public, the Post Office and the national defense.[1] Air route cases are processed under sections of a law, over 20 years old, that have never been squarely before this Court for interpretation.

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[1] There were 849 economic applications (about all of which were for new route authority) filed with the Board during 1958, a year in which the Board disposed of 683 such applications. *Annual Report of the Civil Aeronautics Board for 1958*, 41. As of June 30, 1958, there were 1,616 pending applications in the Board's files (*Ibid.*).

The problems created, but not solved, in the decision below are typical of the problems faced with increasing frequency, and in proceedings of expanding complexity, by all parties to controversies before the Board (and to some extent by parties to proceedings before other Federal administrative agencies). Some of the confusion is the inevitable result of the fact that this Court has never spoken definitively on the meaning of Section 401 of the Act,[1] although air transport routes have been regulated under its terms for more than 20 years.

Section 401 establishes the machinery by which air routes are granted and amended, provides for hearing and decision on applications for new route authority, and states that a new route must be found required by the public convenience and necessity before it be certificated.

This petition presents this Court with an opportunity (1) to define for the lower Courts, the Board, and the parties to proceedings before the Board what Congress meant by the term "public convenience and necessity", and what findings are necessary to sustain a conclusion that a new route is required by the public convenience and necessity, (2) to clarify for all the meaning of this Court's *Ashbacker* doctrine, and (3) to set out clearly the right of a party to administrative proceedings to have his case decided on the merits after full consideration of all pertinent facts and without prejudgment publicly announced and ardently defended.

Each of these matters is increasingly involved before the Board and the Courts of Appeal, and with increasing incon-

[1] The Federal Aviation Act of 1958 made no changes in the substance of §401 of the Civil Aeronautics Act of 1938. See p. 2 n. 1 above. References to "the Act" herein are to the 1938 Act unless otherwise indicated. In any event, the applicable provisions of law are identical under both statutes.

sistency of treatment. Board decisions will be increasingly litigated in the Courts of Appeal unless this Court establishes essential guidelines for future conduct.

I.

It Is In The Public Interest For This Court To Clarify The Requirements Of The Standard of "Public Convenience and Necessity" In Air Route Cases.

Section 401 of the Act states that a new airline route must be required by the "public convenience and necessity" before it can be certificated.

Neither this Court nor any other court has determined what basic findings of public convenience and necessity are essential for a lawful disposition of an application for a new or amended certificate to engage in scheduled air transportation.

Eastern squarely presented that question to the Court below, but Eastern's request for a definitive explanation was ignored.

In efforts to provide the Board with rational factual bases upon which to fashion the Board's permission for future operations,[1] almost every applicant in every route proceeding spends great sums of money and considerable employee and consultant energy in amassing volumes of data forecasting the economic results of its proposed operations. Applicants for new routes make every effort to show in terms of forecast dollars and cents that their operations will be economic and eventually profitable, while opposing carriers exert just as much effort to show that those proposed services cannot be operated profitably.

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[1] Compare: *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417, 421 (D. C. Cir. 1951); *infra*, p. 15.

In the case below, the Board's Bureau of Air Operations requested and the Examiner required the applicants to furnish estimated revenues and expenses (77-80, Requests 2 b,, 3, 5-11, 13). The parties supplied extensive data as requested. (See, *e.g.*, those portions of TWA's exhibits reproduced at 235-38 of the joint appendix below.) Although the Examiner's Initial Decision referred to those estimates in his recital of the evidence (326-30, 334-39, 344-46, 353-56), the Examiner made no findings or conclusions on the basis of those forecasts (376-86) except to find that Eastern would lose $1,500,000 annually by revenue diversion (381). The Board's decisions made no findings or conclusions upon the basis of those forecasts (484-90, 504-506, 653-57) although there was appropriate request for findings (see, *e.g.*, excerpts from Eastern's brief to the Board, 404-405, and petition for rehearing, 620).

Eastern maintains only that the Board should *find* that there must be some reasonable relationship between projected revenues (or traffic) and projected costs (or capacity) before a new route may be granted. If Eastern is wrong and this Court will so state, parties to new route cases before the Board can save hundreds of thousands of dollars annually now wasted in the preparation of new route revenue (traffic) and expense (capacity) forecasts. If Eastern is correct in its contentions, then the awards to TWA and Delta should be set aside and the case remanded to the Board for required findings. Eastern respectfully submits that its interpretation of the Act is reasonable and correct.

In one of the first proceedings before it under its then-new enabling statute, the Board stated that an evaluation of the public convenience and necessity required, among other things, consideration of these questions:

> (1) whether the new service will serve a useful public purpose, responsive to a public need;

(2) whether this purpose can and will be served as well by existing lines or carriers; and

(3) whether it can be served by the applicant with the new service without impairing the operations of existing carriers contrary to the public interest. *United Air Lines, Inc., Red Bluff Operations,* I C. A. A. 778, 779-90 (1940).

At the other end of the chronological scale, the Board declared less than a year ago in a proceeding known as the *South Central Area Local Service Case,* CAB Docket 7939 *et al.,* that:

> "in arriving at its decision on new route proposals, the Board must evaluate all the traditional elements of public convenience and necessity, such as public need for the service, *potential traffic,* benefits involved, *cost of operation, commercial revenues,* subsidy requirements, *diversion,* etc." (Emphasis supplied.) (Mimeographed opinion, CAB Order E-13648, p. 62, Mar. 21, 1959.)

In the twenty year interval between *Red Bluff* and *South Central,* the Board has generally acknowledged the requirements that it laid down in *Red Bluff,* and contemporaneously decided cases. See, *e.g., Eastern Air Lines, St. Louis-Nashville-Muscle Shoals Operations,* I C. A. A. 792, 795 (1940).

Eastern believes that the Court of Appeals for the District of Columbia recognized, several years ago, that the Board is required to make specific findings upon such fundamental items as revenues measured against costs of operations when it said that the function of the Board is to:

> "examine the relevant past and present and then to exercise a rational judgment upon the data to

> ascertain the public convenience and necessity in the reasonably foreseeable future." *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (D. C. Cir. 1951).

While findings as to potential revenues and potential expenses cannot be made with absolute precision, the same Court correctly, Eastern submits, declared:

> "governmental permissions for the future cannot be fashioned from pure fantasy, speculation devoid of factual premise. Public convenience and necessity in the sense of those statutes has a hard core of factual possibility, which can be ascertained and evaluated only upon the basis of present and past events and conditions." *American Airlines* v. *Civil Aeronautics Board, supra,* at 421.[1]

It is, or should be, the Board's function to resolve conflicting claims as to the economics of a proposed route. At least as recently as the *South Central Area* case, *supra,* the Board recognized an obligation to balance revenues against costs in determining public convenience and necessity. However, it did not attempt that balancing in the case below when it granted the TWA and Delta routes, and the decision of the Court of Appeals below would completely absolve the Board from any such obligation.

Eastern presented to the Court below the issue: Must the Board, in evaluating public convenience and necessity claims balance capacity offered by all carriers (the new plus the old) and expectable expenses against the expectable traffic and revenue (720-22, 725-26; the specific question was

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[1] It should be pointed out that *American* did not concern itself with a review of the standards of public convenience and necessity as that term is used in §§2 and 401 of the Act. That case involved the issue whether the Board had power under the Act to create a special class of carriers limited to the transportation of freight only.

pinpointed in Eastern's briefs to the Court, being fairly comprised in these cited portions of Eastern's petition for review). The Court did not pass upon the question, but only recited that the Examiner and the Board had found "Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area". (App. B, p. B23). Those findings may, of course, be relevant to the ultimate question of public convenience and necessity, but the question is whether they obviate *any need* to consider whether the proposed operations will be economic. The Court did *not* resolve the issue raised by Eastern, namely, that of adequacy of findings and of required findings. Instead of concluding that the Board's findings did or did not satisfy the statutory mandate, the Court concluded that the Board was justified, on the facts of the case, in not reopening the record, as requested by Eastern, to receive current operating data,[1] (*Ibid.*)

Eastern contends that no informed judgment as to the requirements of the public convenience and necessity can be made without resolving the always hotly-contested issue: will the new operation be economically feasible? And such a determination can be made *only* by some reasonable bal-

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[1] While Eastern urged below that the Board erred in failing to take account of more recent experience by Eastern over the routes in question, that assignment of error was quite distinct from the contention urged both in this Court, and in the Court below, that the Board did not make proper or adequate findings on the basic elements of public convenience and necessity. Eastern's petition for review, and amendment thereto, and Eastern's briefs to the Court, treated these issues independently; compare 719-22, 725-26, 745-46, 747-48 (required findings on "public convenience and necessity") with 748-49 (more recent operating data). It is regrettable that the Court below confused Eastern's contentions and avoided passing upon the issue of adequate findings since, to the best of Eastern's knowledge, no court has ever interpreted and explained the term "public convenience and necessity" as contained in the Act.

ancing of anticipated revenues against expenses. If this Court should fail to speak authoritatively on the Board's fact-finding and adjudicatory responsibilities vis-à-vis the "public convenience and necessity," the Board would have free rein to award new routes without regard to their economic feasibility. Applicants for new routes would not know the showing required to establish public convenience and necessity and existing carriers would be deprived of their most effective means of protecting their position and of demonstrating the lack of need for a new service—a careful presentation of hard economic facts.

To protect litigants in future Board proceedings, to establish guidelines for the Board, and to chart a clear path for future interpretations of section 401, this Court should review the judgment below and clearly define what are lawfully required findings of "public convenience and necessity".

II.

It Is In the Public Interest For This Court To Clarify Its *Ashbacker* Doctrine As Applied To Air Route Cases.

Section 401 of the Act guarantees applicants for new route authority a right to hearing. It is manifest that this right requires a *fair* hearing according to the *Ashbacker* case, *supra*. *Ashbacker* arose when Fetzer was awarded a radio frequency for which Ashbacker had also applied, but Ashbacker's application had not been heard. The frequency could be granted only to one. When the case reached this Court, it was said:

> "where two *bona fide* applications are mutually exclusive the grant to one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." (326 U. S. at 333.)

A. The Problem Is Significant.

For over 15 years, the *Ashbacker* doctrine of mutual exclusivity has been law, and for more than ten years, the Board and the lower courts have been struggling with its application to air route cases. No one disputes it vitality there.[1] However, much confusion has resulted in its application in this field. In every route proceeding of any consequence before the Board, the problem is raised, and at least 12 times the Courts of Appeal have been asked to rule on an *Ashbacker* issue.[2] The issue has also arisen out of pipeline proceedings before the Federal Power Commission. See, *e.g.*, *Midwestern Gas Transmission* v. *Federal Power Commission*, 258 F. 2d 660 (D. C. Cir. 1958), vacated, 358 U. S. 280 (1959), and the problem recurs frequently before the Federal Communication Commission, where *Ashbacker* began.

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[1] The Court of Appeals for the District of Columbia declaring *Ashbacker* applicable to air route cases stated that: "... *Ashbacker* [is] a rule of substance and not ... a mere prescription of form." *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F. 2d 17, 21 (1955).

[2] *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 178 F. 2d 726 (D. C. Cir. 1949); *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board*, 181 F. 2d 777 (D. C. Cir. 1949); *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 184 F. 2d 545 (9th Cir. 1950); *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*, 194 F. 2d 339 (D. C. Cir. 1952); *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F. 2d 13 (D. C. Cir. 1955); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F. 2d 17 (D. C. Cir. 1955); *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 241 F. 2d 445 (D. C. Cir. 1957); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 243 F. 2d 607 (D. C. Cir. 1956); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 247 F. 2d 562 (D. C. Cir. 1957); *National Airlines, Inc.* v. *Civil Aeronautics Board*, 249 F. 2d 13 (D. C. Cir. 1957); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 271 F. 2d 752 (2d Cir. 1959), and this case below. All of these cases involved *Ashbacker* considerations and the *Ashbacker* case was cited in each one except the first *Eastern* case.

B. The Decisions Below Are Confusing and In Conflict.

Ashbacker recognizes that when two persons desire a license to perform a service and the license can be granted to only one, the due process right to a fair hearing requires that both applications be heard simultaneously and considered concurrently.

The Court below remarked that it has previously pointed out "that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases" (App. B, p. B7). Until the case below, it was generally believed, on the basis of the *Delta* case, *supra*, that *Ashbacker* required consolidation of all applications for new routes within the "area" of an area proceeding. The Court below went on to say (App. B, p. B20 n. 24) that "the reasoning of that opinion [*Delta*] requires the same kind of hearing in a case such as this, where a *prima facie* showing is made of mutual exclusivity of applications for a particular route" extending *beyond* the confines of the "area."

The Court below thus expanded the reasoning of *Delta* to encompass those situations where an application to join an applied-for new route within the "area" combined with an existing route outside the "area" is mutually exclusive of an application for the entire route that is not consolidated. Such a result is inevitable, and desirable, since neither the Board nor the Courts could ignore the realities of the situation: if a route between A, B and C is awarded by adding a new segment B-C to an existing segment A-B, it is just as much a new route between A and C as if a new segment B-A were added to an existing segment C-B, or if an entirely new route A-B-C were awarded. They are three different ways of accomplishing the identical result, a route between A and C via B, and *Ashbacker*—"a rule of substance, not a mere prescription of form" (*Delta*,

supra)—is equally applicable to all three. Thus, the Board could not lawfully grant TWA a new St. Louis-Southeast Florida extension of its existing West Coast-St. Louis route, thereby creating a transcontinental West Coast-St. Louis-Southeast-Florida route without giving Eastern a hearing on its application for a new St. Louis-West Coast extension of its existing Florida-Southeast-St. Louis route to create a transcontinental West Coast-St. Louis-Southeast-Florida route offering the same services as TWA or without valid findings that the TWA grant would not be mutually exclusive of the Eastern proposal (App. B, pp. B16-B20).

The Board had urged that the case was a limited "area" proceeding, and, in effect, that *Ashbacker* did not apply. Adoption of that contention would have reduced *Ashbacker* to meaningless form without substance, and the Court emphasized below "that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine." (App. B, p. B7). Eastern submits that the Court properly analyzed the law in that regard, asserting the vitality of *Ashbacker* and its resistance to subterfuge.

However, the Court did a complete *volte face* when it considered Eastern's contentions respecting the Delta award. The Board authorized Delta to combine its existing Kansas City-Memphis authority (outside the "area") with the authority applied for between Memphis and Birmingham to provide a Kansas City-Birmingham/Atlanta service. As pointed out above in the Statement of the Case, Eastern was a long-standing applicant for Kansas City-Southeast authority, but the Board refused to hear Eastern's application below. Surely, in the light of the Court's interpretation of *Ashbacker* as to the TWA award, that was error. Yet the same Court in the same decision held that

because the Kansas City-Memphis segment was a "little additional segment outside the area" (App. B, p. B21; *cf.* App. B, p. B20: Kansas City "being well outside the area of the case") *Ashbacker* did not apply, and the Board was at liberty to disregard Eastern's "mutual exclusivity" contentions. Eastern is at a loss to reconcile the Court's completely inconsistent approach in light of its statement that the Board could not intentionally or otherwise avoid *Ashbacker*. Neither can Eastern square the Court's treatment of the Delta award with its refusal in *Midwestern Gas Transmission, supra,* 258 F. 2d at 667, to require *"Ashbacker"* to bow to expediency as urged by the Federal Power Commission.

It would appear from the opinion of the Court below that *Ashbacker* applies only to "area" cases that become, willy-nilly, transcontinental cases, and that *Ashbacker* would *not* apply when a 379-mile segment (the nonstop distance between Memphis and Kansas City) is the extent of the "area's" wanderings. The Court's holding that "the doctrine of *Ashbacker* also arises where a request for an extension of an existing routing would preclude the grant of other pending applications for the entire route" (App. B, p. B9), would be rendered meaningless by its own ruling on the Delta award.

It is respectfully submitted that the right to a fair hearing is an absolute right, not dependent upon mileages or mileage variations, absolute or relative. It is also respectfully submitted that there is no substantive distinction between the *Ashbacker* considerations inherent in the TWA award and those inherent in the Delta award. The TWA award involved a 1,073-mile proposed route between Miami and St. Louis (nonstop) and a 1,591 mile existing route between St. Louis and California (nonstop St. Louis-Los

Angeles). The Delta award involved new route mileage between Birmingham and Memphis, 212 miles inside the area, and a route of 379 miles between Memphis and Kansas City, outside the area. The relationship between "inside the area" and "outside the area" mileage is similar in the TWA award and in the Delta award. Further, it certainly could not be said that *Ashbacker* protects 1,591-mile route proposals but not 379-mile route proposals. The latter may be relatively more important than the former in such vital particulars as passengers, revenues, operational flexibility, etc. and certainly the latter could be more easily protected, procedurally, by the Board. The *right* to a *fair hearing* must be the same for the small as for the large; yet the Court below would protect only the large.

The Court's disposition of the issue raised by the *Delta* award is at variance with the same Court's (and basically the same panel's)[1] decision in *Eastern Air Lines* v. *Civil Aeronautics Board*, 243 F. 2d 607 (D. C. Cir. 1956). In that case, Eastern appealed the Board's consolidation order in the *Great Lakes-Southeast Service Case, supra*, alleging that the Board violated the *Ashbacker* doctrine by consolidating, *inter alia*, applications of Northwest Airlines, Inc. ("Northwest") for a new route between Chicago and Florida (where Eastern operated) without hearing Eastern's applications for new authority between Chicago and points in the Pacific Northwest served by Northwest. Northwest's application, if granted (and it subsequently was), would have permitted transcontinental operations between, for example, Seattle and Florida, and so would Eastern's application *if* it had been heard, and *if* it had been granted. The *Great Lakes Case* was an "area" pro-

[1] Two of the three Judges who sat in the case below also served in the *Eastern* case. The same Judge wrote both opinions.

ceeding, and surely if the opinion below had been extant at that time, it would have been held controlling as being on all-fours, since the Board in each instance expanded an "area" case into a transcontinental proceeding. However, the Court stated, in *dicta*,[1] that application of *Ashbacker* would transform a "limited area case" into a "massive consideration of the whole of American air transportation" (243 F. 2d at 609). It is impossible to reconcile the 1956 *Eastern* case and the opinion below.

That is not the end of the conflict in *Ashbacker* between the *Great Lakes Case, supra*, and the *St. Louis Case*, as the proceedings were known before the Board. Eastern appealed the *Great Lakes Case* to the Court of Appeals for the Second Circuit (after the Board had decided it) alleging that the grant to Northwest of the route described above violated *Ashbacker*. The Second Circuit ruled that Eastern had not shown mutual exclusivity and that the Board was not compelled to rule on *Ashbacker*. *Eastern Air Lines* v. *Civil Aeronautics Board*, 271 F. 2d 752, 757 (2d Cir. 1959). That holding conflicts with that of the Court below that, where a *prima facie Ashbacker* situation appears, the Board is required to make specific findings on the issue.[2] (App. B, p. B14.)

This Court should, in the interests of the orderly and uniform administration of justice, particularly in a matter of such great importance as this one which affects so many proceedings before administrative agencies, review the

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[1] The Court ruled that the consolidation order was not a final order and thus was unreviewable, and dismissed the case for want of jurisdiction. However, it said (at length) that *Ashbacker* was not applicable where a limited area case would become a transcontinental case.

[2] Eastern will present to this Court on March 14, 1960, a petition for certiorari to review the decision of the Second Circuit.

decision below and unequivocally explain the law for the guidance of all. The decisions below present intercircuit, intracircuit and intradecision conflicts.[1]

III.

It Is In The Public Interest For This Court To Review The Board's Practice Of Prejudging Cases Through The Press Release Decision Procedure.

Eastern alleged below that it was denied a fair hearing because the Board prejudged the issues of the proceeding and announced awards of valuable route authority competitive with Eastern without giving supporting reasons and without considering all the material facts. By its "press release decisions" the Board effectively fettered its discretion and precluded any open-minded consideration of the facts in the preparation of its formal decision.

Shortly after the Board deliberated on the case, it announced its "tentative decision" to award the TWA and Delta routes (March 26 and 31, 1958; see Statement of Case, *supra* and 660, 663, 666). Some six months later it issued a formalized decision announcing its reasons for the awards. The findings of fact relied upon to sustain the awards were based largely on data not available to the Board at the time of its press release decisions.[2]

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[1] This Court's Rule 19, 1 (b) indicates that certiorari will be granted to reconcile conflicts between circuits. In such cases as *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507 (1950), *Maggio* v. *Zeitz*, 333 U. S. 56 (1948) and *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180 (1939) this Court has granted certiorari to achieve intracircuit uniformity. The conflict within the District of Columbia Circuit is of grave consequence, particularly in view of the fact that most appeals from orders of the Civil Aeronautics Board are heard in that Circuit.

[2] See pages 486, 493, 498, 502, 507 of the joint appendix where the Board refers to "March & September 1957 O & D Surveys" and

Rule 36 of the Board's Rules of Practice[1] provides that in making its decision on controversies before it the Board will consider the whole record, the Examiner's Initial Decision, and the exceptions to it, will resolve all questions of fact by the greater weight of the evidence and then issue an appropriate order. Rule 36 adheres to the judicially-recognized "process which a commission properly follows in reaching a decision", to borrow the words of the Court in *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554, 559 (D. C. Cir. 1938) which stated, with respect to deciding cases:

> "The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence, a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

The Board stated that its "press release decisions" did not constitute the final decision (663, 668), and argues that they were "tentative" (660), subject to change, if necessary.

Section 8 (b) of the Administrative Procedure Act provides, in part, that

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other 1957 traffic data, as well as "Form 41 Reports" for 1957 (507). The "O & D Surveys" are compilations of reported air traffic flows by origin and destination and are the basic source material for any analysis of air passenger movements. "Form 41 Reports" are reports filed by all carriers with the Board, reporting their operations in detail. Neither the September 1957 O & D Surveys nor the Form 41 Reports for 1957 were available to the Board in March, 1958, when the "press releases" were issued.

[1] Required to be published by §3(a) of the Administrative Procedure Act.

> "All decisions (including initial, recommended, or *tentative* decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, sanction, relief, or denial thereof." (Emphasis supplied.)

Eastern contended, both before the Board and before the Court below, that it was deprived of a fair hearing and decision by the Board's "press release" decision practice. The Board brushed Eastern's contentions aside (660) and the Court ignored Eastern's contentions.

This Court is respectfully requested to declare the "press release" procedure invalid. It is a matter of grave consequence, permeating as it does the Board's entire decisional process, and has given rise to criticism in another Circuit, as well as within the membership of the Board itself.

A. The Press Release Decision Procedure Has Far-Reaching Consequences

In August 1956, to prevent "leaks", the Board commenced announcements of new route awards by "press release" prior to the formulation and adoption of formal opinions. Since then *every* major CAB route case has had its result foretold several months in advance of the formal order by a "press release" decision. Between August 1956 and May 1959, there were 41 cases so decided[1]. CAB Member Hector has criticized the practice freely, pointing out that for all practical purposes, the "press release" *is* the decision of the Board, and as such it violates the Admin-

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[1] See *Great Lakes-Southeast Service Case*, CAB Docket 2396 *et al.*, CAB Order E-13835 (May 7, 1959), mimeo., Member Hector's concurring and dissenting opinion 4.

istrative Procedure Act and the Board's own Rules of Practice[1]. He said[2]:

> "To my mind this is not a mere theoretical legal issue. When an agency announces a tentative decision in a press release, forces are set in motion which cannot be reversed. It is unrealistic to state that the agency retains full freedom of deliberation, discussion and reconsideration after a vote is made public and parties begin to act in reliance thereon."

Member Hector also noted that once a "press release" is announced, the parties prepare to implement the awards "and take other steps involving expenditures of a magnitude which no responsible business man would undertake unless he knew that a decision had in effect already been made[3]".

Member Hector's vigorous opposition to the practice illustrates the far-ranging nature of its consequences: *all* major decisions are so announced, the formal decision invariably conforms in major particulars to the "press release", parties commence actions in reliance on the "press releases", and the Board loses its freedom of action to consider the case on its merits when the actual work of opinion-writing begins.

The Board itself admits that the situation is at best an unhappy one, conceived in necessity.[4] If it is not stopped by this Court, the Board will continue its use, and the practice may spread to all other agencies which adjudicate con-

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[1] *Id.* at 4-5.

[2] *Id.* at 5.

[3] *Id.* at 4.

[4] The Board alleges a necessity for preventing "leaks" of its votes by untrustworthy persons who participate in the decisional process, attending the Board's deliberations. *Eastern Air Lines* v. *Civil Aeronautics Board*, 271 F. 2d 752, 757, n. 10 (2d Cir. 1959). The very excuse offered should condemn the decisions themselves as being infected with impropriety.

troversial matters attracting wide-spread public interest.[1] The result will be administrative adjudication by "press release"—an anathema upon any concepts of due process.

B. The Press Release Decision Procedure Is Unlawful.

The above discussion of the consequences of the "press release" decision practice has touched on its illegality. Clearly Member Hector regarded the practice as unlawful, and indeed it is impossible to reconcile its usage with the requirements of the Administrative Procedure Act and Rule 36 of the Board's own Rules of Practice.

It should be remembered that the Board in its deliberations sits as a fact-finding jury and it is axiomatic that jurymen should not announce their "tentative" conclusions prior to consideration of all the evidence. It was stated in *Pool* v. *C. B. & Q. R. Co.*, 6 Fed. 844, 850 (D. Iowa 1888) (ordering new trial because of juror's misconduct):

> "Now the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature. Where, therefore, a juror talks outside the jury room about a case pending and undecided before him, he gives the clearest evidence

[1] The Federal Communications Commission adopted the "press release" procedure shortly after the Board's first experimentations with it. See FCC Public Notice 41611, February 7, 1957, "FCC To Announce Instructions In Docket Cases." The broadcast industry trade magazine explained that the Commission, like the Board, had been plagued with "leaks" in important television license and deintermixture proceedings and was adopting the Board's practice to combat the problem. 52 BROADCASTING 65 (Feb. 11, 1957).

> that he is not an impartial and unbiased juror. The very discussion of any matter by a juror elsewhere than in the jury room tends to the forming of false impressions and prejudgments. Nor will it do for a moment to accept the statement of the juror that what he has said or heard has not affected or influenced his judgment."

This Court can take judicial notice of human nature, as described in the passage quoted.[1]

It has been pointed out that the provision of the Administrative Procedure Act for supporting reasons and findings of fact to accompany decisions of administrative agencies is not an idle requirement:

> "Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend." Landis, *The Administrative Process* 106 (1938).

Eastern raised the "press release" consideration in the Second Circuit in the appeal of the *Great Lakes-Southeast Service Case, supra,* and that Court expressed consid-

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[1] It should be made clear that there is nothing but the most superficial resemblance between the "press release" practice and the rarely-used practice of this Court, and other courts, appearing sometimes in extraordinary circumstances, of announcing a *final* judgment before there has been sufficient time to reduce the judgment to writing. For example, in the *Little Rock School Case, Cooper* v. *Aaron*, 358 U. S. 1 (1958), this Court made it abundantly clear that it was announcing its *final judgment* after "having fully deliberated" on the issues and that the imminence of the new school year at Little Rock coupled with the physical impossibility of reducing the Court's already carefully reasoned judgment to writing made it "important to make prompt announcement of our judgment." The "press release" decision practice of the Board is not even remotely comparable. This Court did not, and it is submitted would not, announce that it had "tentatively" decided to issue its order, but that it would make up its mind definitely and publish its opinion later after it had had time to look at the record in the case.

erable difficulty with the practice. Although the Court did not find that its use constituted reversible error, the Court was carefully critical: "We do not mean to express approval of the Board's practice of making public its tentative decisions." 271 F. 2d at 758.

The Court below in this case did not discuss the matter of the "press release" decision. That Court's disregard for the issue, coupled with the Second Circuit's grave concern about the practice, presents a conflict of views that should be reconciled by this Court. Since *all* of the Board's major route awards are announced by "press release" decisions, considerable future litigation will certainly result unless, and until, this Court rules upon the practice.[1]

Aside from the general public interest in the practice, it is also a matter of acute public interest that this Court reaffirm the right of litigants in administrative proceedings to a fair determination of the issues on the record, fairly considered, and not consign their fates to trial by press release.

The question is: May an administrative agency make up its mind, vote, and publicly announce its determinations without giving supporting reasons and without ever considering material it later finds essential to its formal opinion and order, that is, material not even in existence at the time of the vote, decision and announcement?

Eastern submits that the answer required by the due process clause of the Fifth Amendment, by the statutes governing administrative procedure, and by fundamental

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[1] As recently as February 15, 1960, a petition for review of an order of the Civil Aeronautics Board was filed in the District of Columbia Circuit Court of Appeals where the petitioner alleged, *inter alia*, that the Board's "press release" procedure had prejudiced it. *Southeastern Aviation, Inc.* v. *Civil Aeronautics Board*, No. 15566 D. C. Cir., Feb. 15, 1960, Petition for Review 6, subpara. (m).

common law concepts of Anglo-American jurisprudence is an emphatic "No."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 9, 1960.

APPENDIX A.

Statutes and Regulation Involved.

Fifth Amendment to Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001

Section 3(a):

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) description of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or [illegible] of the general course and method [illegible] functions are channeled and determined, inc[illegible]ature and requirements of all formal or informa[illegible]s available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules

addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(60 Stat. 238, 5 U. S. C. §1002(a))

SECTION 8(b):

SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

(60 Stat. 242, 5 U. S. C. §1007(b))

SECTION 10(a):

RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(60 Stat. 243, 5 U. S. C. §1009(a))

SECTION 10(e):

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all rele-

vant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(60 Stat. 243, 5 U. S. C. §1009(e))

Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 U. S. C. §401

SECTION 2:

In the exercise and performance of its powers and duties under this Act, the authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

(52 Stat. 980, 49 U.S.C. §402)

SECTION 401:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on June 23, 1938, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity, otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

* * * * * *

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any,

between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certifiy that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration,

such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

(52 Stat. 987, 49 U. S. C. §481)

SECTION 1005(f):

Form and Service of Orders

Every order of the Authority [Board] shall set forth the findings of fact upon which it is based, and shall be

served upon the parties to the proceeding and the persons affected by such order.

(52 Stat. 1023, 49 U.S.C. §645(f))

SECTION 1006(a):

Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(52 Stat. 1024, 63 Stat. 107, 49 U.S.C. §646(a))

SECTION 1006(f):

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28.

(52 Stat. 1024, 49 U. S. C. §646(f))

Appendix A.

CIVIL AERONAUTICS BOARD, RULES OF PRACTICE IN ECONOMIC PROCEEDINGS, RULE 36.

SECTION 302.36 *Final decision of the Board.* Upon submittal of a case to the Board for final decision on the merits the Board will consider the whole record, including the initial or recommended decision of the Examiner of its tentative decision, and the exceptions thereto, will resolve all questions of fact by what it deems to be the greater weight of the evidence thereon, will make its decision, stating the reasons or basis therefor, and enter an appropriate order.

(17 F. R. 3020, Apr. 8, 1952)

APPENDIX B

Opinions and Judgments Below.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 14798

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CITY OF NASHVILLE and THE NASHVILLE CHAMBER OF COMMERCE,

CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,

CITY OF KANSAS CITY, MISSOURI,

CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

TRANS WORLD AIRLINES, INC.,

EASTERN AIR LINES, INC.,

INTERVENORS

No. 14804

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,

CITY OF KANSAS CITY, MISSOURI,

CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

TRANS WORLD AIRLINES, INC.,

EASTERN AIR LINES, INC.,

INTERVENORS

Appendix B

No. 14812

EASTERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE.
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
DELTA AIR LINES, INC.,
INTERVENORS

No. 14822

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
INTERVENORS

On Petitions to Review Orders of the Civil Aeronautics Board

Decided December 10, 1959

Appendix B

Before PRETTYMAN, Chief Judge, and BAZELON and FAHY, Circuit Judges.

PRETTYMAN, Chief Judge: These are four petitions for review of orders of the Civil Aeronautics Board made in its *St. Louis-Southeast Service Case*. Principally the Board awarded to Trans World Airlines, Inc. (TWA) a new route from St. Louis to Miami and other Florida coast points, and to Delta Air Lines, Inc., a new Memphis-Birmingham route.

The cases in this court fall into two main parts, one relating to each of the above-mentioned awards. The discussion, however, more aptly falls into four divisions: (I) The mutual-exclusivity contentions advanced by American, Delta and National. These carriers claim that TWA was awarded an effective southern transcontinental route without consideration of economically mutually exclusive applications. (II) Impact of the award to TWA on an existing southern transcontinental interchange arrangement. (III) Eastern's contentions concerning mutual exclusivity. Eastern claims that the Board erroneously made awards to TWA and Delta without comparative consideration of its mutually exclusive applications. (IV) The merits of the TWA and Delta awards, apart from mutual-exclusivity arguments, and some miscellaneous contentions.

I

Two proceedings before the Board play parts in this problem. One is the *St. Louis-Southeast Service Case*, which was instituted to inquire into the need for service "between St. Louis on the one hand and Florida and other southeastern points on the other". Several applications were consolidated in that case.[1] As we have noted, the orders here under review were entered in that

[1] Order No. E-10304 (May 18, 1956); Order No. E-10651 (Oct. 2, 1956).

proceeding. The other case which plays a part in the contentions made to us is known as the *Southern Transcontinental Service Case*. It was a combination of several proceedings, which initially had various names. In its order of consolidation in the *Southern Transcontinental Case*[2] the Board delineated the scope of the proceeding to include (1) the need for single-carrier service between Houston and West Coast points, (2) the need for "single-carrier transcontinental service" between Florida points and the West Coast, and (3) the need for single-carrier transcontinental service between Atlanta-Birmingham and the West Coast. In that order the Board repeatedly used the expression "southern transcontinental route". The Board explained that in prescribing the scope of this hearing it intended to consider new or additional through service in the southern tier of states, that is, from Florida across the southern boundary of the country to and including California. The Board said in that connection: "* * * it is necessary to establish a framework in which all major southern transcontinental service issues as a whole can be determined for the foreseeable future." As thus arranged, the case included a large number of applications.

In the *St. Louis Case* various preliminary motions were made by different carriers, which motions fall generally into two classes. The first class was for expansion of the proceeding to include applications for extensions westward of existing routes into St. Louis from the East, so as to add to them routes from St. Louis to the West Coast, and in the opposite direction for extensions eastward of existing routes into St. Louis from the West, so as to add to them routes from St. Louis to the Southeast. These motions were denied. The other class of motions was to impose restrictions upon any grant of a new route from St. Louis to Florida points, so as to prevent any

[2] Order No. E-12861 (Aug. 5, 1958); Order No. E-13132 (Nov. 4, 1958).

grant of such a route from being in effect a through service Florida-California via St. Louis. In response to these motions the Board announced as a minimum restriction a requirement that service on any route granted between California points and Florida points via St. Louis must include a stop at St. Louis. And the Board further announced that the parties would not be foreclosed from advancing in the course of the hearing appropriate evidence which might reflect a necessity for more stringent limitations. Thus the Board limited the hearing in the *St. Louis Case* to service between St. Louis and Florida and other Southeast points.

The Board awarded to TWA the route from St. Louis to Florida points[3] and imposed as the sole limitation the previously described mandatory-stop requirement at St. Louis. TWA was already certificated for through service from St. Louis to California coast points, and the new award was cast in the form of an amendment to TWA's existing Route 2, which was the St. Louis-West Coast route. The effect of the order was to authorize one-plane, one-carrier, through service from Florida coast points to California coast points via St. Louis, with a mandatory stop at St. Louis.

The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast. For example, the Board pointed out that TWA's service, "operating nonstop from Los Angeles or San Francisco to St. Louis for expedited carriage to the Southeast onward from St. Louis, will provide a usable and convenient alternative service to the multiple-stop flights operated by the National-Delta American Interchange, and bring important service benefits to a respectable portion of the

[3] Order No. E-13026 (Sept. 30, 1958); Order No. E-13248 (Dec. 8, 1958).

passengers moving in these markets." And in its ruling on a motion for reconsideration the Board said:

> "The TWA award, of course, will permit that carrier to operate a usable one-stop, single-plane service between the West Coast and the points in the Southeast that are being added to its route. It was the carrier's ability to provide these 'beyond area' benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity."

The principal point made by petitioners as to this award is that the Board could not restrict the nature and scope of the *St. Louis Case* to considerations limited to St. Louis-Florida points service, and then in that same case make an award which was for all practical purposes a one-carrier, one-plane, through transcontinental Florida to California route, when there were pending unheard in another proceeding (the *Southern Transcontinental Case*) many applications for transcontinental service Florida to California. This argument is premised upon the fact that the route awarded TWA makes its Florida-California service very slightly longer than would be any route which might be awarded in the *Southern Trancontinental Case*. This method of reaching an award, say the petitioners, is a direct evasion of the *Ashbacker* doctrine.[4]

The law which was established by the Supreme Court in the *Ashbacker* case has been sloganized, given a name, and is often discussed as though it were a technicality. The law which the Court there laid down was far from a technicality. The statute involved (the Communications Act) provided in effect that applicants for licenses should have a right to a hearing before their applications are denied. Two applications which were mutually exclusive were pending. The Court held that the Commission could

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[4] *Ashbacker Radio Co.* v. *Federal Communications Comm'n*, 326 U. S. 327 (1945).

not grant one without a hearing of the other. The Court said, *inter alia*:

> "For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before a denial of their applications becomes an empty thing."[5]

The ruling was a practical conclusion of sound common sense. It is simply a realistic truth that, if only one of several applications can be granted, an award to one applicant is as effective a denial of all the others as would be a flat order of denial.

The foregoing conclusions were premised upon a physical mutual exclusivity of two licenses. It is true, as the Board argues, that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air Lines* v. *Civil Aeronautics Board*.[6] We now iterate the doctrine there stated; the Board must have a considerable measure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine.

Another general doctrine, based upon economic considerations, is pertinent to the present case. In many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity.[7] The public

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[5] *Id.* at 330.

[6] 100 U. S. App. D. C. 184, 243 F. 2d 607 (1956), cited and quoted in *Eastern Air Lines* v. *Civil Aeronautics Board*, 101 U. S. App. D. C. 156, 247 F. 2d 562 (1957).

[7] As to air transportation, Sec. 401(d)(1), Civil Aeronautics Act, 52 STAT. 987 (1938). The Federal Aviation Act of 1958, which supersedes the Civil Aeronautics Act, contains the same provision, Sec. 401(d)(1), 72 STAT. 754, 49 U. S. C. A. §1371(d)(1).

interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee. This is a commonplace of public utility regulation. We discussed the principle at length in *Carroll Broadcasting Co. v. Federal Communications Comm'n.*[8]

The Civil Aeronautics Act[9] requires notice and hearing on applications for certificates for new routes, and also requires notice and hearing upon petitions for modifications of existing licenses, which latter include extensions of existing routes.[10] Under the Act (Sections 401 (d)(1) and 401(h))[11] a finding of public convenience and necessity is a requirement for either the grant of a new certificate or the extension of an existing route. So the principles we have been discussing apply to air certifications. If the grant of one of several applications for a new route does, as a matter of economic necessity, preclude the grant of any other application, the doctrine of *Ashbacker* clearly applies. Likewise, if the foreseeable traffic would support two carriers and there are, let us

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[8] 103 U. S. App. D. C. 346, 258 F. 2d 440 (1958). The principle is also discussed at length in the dissent in RCA Communications *v.* Federal Communications Comm'n, 91 U. S. App. D. C. 289, 294-296, 201 F. 2d 694, 699-701 (D. C. Cir. 1952), with citations, and is a thread which runs through the opinion of the Supreme Court in that case, Federal Communications Comm'n *v.* RCA Communications, Inc., 346 U. S. 86 (1953). This was a telegraph case, in which the competition involved was economic, not a radio case in which the exclusivity is physical. Gerico Investment Co. *v.* Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958), prior to *Carroll*, contains a clear intimation to the same effect.

[9] Sec. 401(c), 52 STAT. 987 (1938), as reenacted, 49 U. S. C. A. §1371(c).

[10] Sec. 401(h), 52 STAT. 989 (1938), as reenacted, 49 U. S. C. A. §1371(g). See, *e.g.*, Eastern Air Lines, Inc., et al., Great Lakes to Florida Service, 6 C. A. B. 429 (1945); Delta Air Corp., et al., Service to Atlanta and Birmingham, 2 C. A. B. 447 (1941).

[11] *Supra* notes 7 and 10.

say, five applicants, the grant of any one is an effective denial of three of the remaining four applications, and *Ashbacker* applies.

The Board denies the applicability of *Ashbacker* in this latter situation and refers us to *Pauley v. Federal Communications Comm'n.*[12] However that case involved neither a grant nor a denial of an application and thus is not remotely pertinent to the situation now before us.

The doctrine of *Ashbacker* also applies where a request for an extension of an existing route would preclude the grant of other pending applications for the entire route. If one certificate for a route exists, and if the grant of a second competitive route would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest, the public interest precludes the competitive grant. The Board has frequently recognized and applied this latter rule; as a matter of fact it almost always does so.[13]

This bring us to a consideration of the practicalities of the situation in the case before us. The characteristics of a restricted-area service are entirely different from those of a transcontinental service. This is well recognized in the industry. We think the Board cannot be compelled to expand an area case: but at the same time it cannot be permitted to transform the nature of an area case without applying to it the factors which govern the case as trans-

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[12] 86 U. S. App. D. C. 294, 181 F. 2d 292 (D. C. Cir. 1950).

[13] See, *e.g.*, Southern Transcontinental Service Case and Dallas to the West Service Case, C. A. B. Order No. E-12861 (Aug. 5, 1958); Investigation of Service to Winston-Salem and/or Greensboro-High Point, C. A. B. Order No. E-12873 (Aug. 8, 1958), 1A Av. L. Rep. par 22,192; Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953); Transcontinental & Western Air, Inc., et al., Detroit-Memphis Service, 6 C. A. B. 117 (1944). *Cf.* Seven States Area Investigation, C. A. B. Order No. E-13254 (Dec. 8, 1958), 1A Av. L. Rep. par. 22,226, 22,226.11 (new competitive service would be too costly to the Government in subsidies).

formed. It cannot hear an area case and, without more, make a transcontinental award. It cannot thus ignore pending applications for a transcontinental route certificate, if those applications are mutually exclusive with the award being made. Petitioners, or some of them, had pending applications for through routes Florida to California coast. These were consolidated in the *Southern Transcontinental Case*. They endeavored by motions in the *St. Louis Case* to persuade the Board to do one of two things, either restrict any award in that case so stringently as to preclude its being effective through southern transcontinental or give comparative hearing to all pending applications for such a route. They now argue to us that the maximum power of the Board under the statute, construed according to *Ashbacker*, was limited to these two alternatives. The Board apparently agrees with the general principles underlying these arguments; references to them appear in the orders of consolidation.

So the first debated question in whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer.

In its initial opinion which supported the order in the proceeding now before us, the Board emphasized that the route to be awarded TWA, involving only 12 per cent circuity over a more direct routing between the Southeast and the West Coast, would provide a convenient alternative service to the existing National-Delta-American Interchange. It noted American's estimate that the new award would divert about 50 per cent of the existing interchange traffic.

Appendix B.

In prior proceedings the Board had concluded that the available business would not support two southern transcontinental interchange arrangements. In 1951, after a comparative hearing of all then-pending applications, it licensed a single-plane Florida to California service via New Orleans-Dallas by an interchange arrangement operated by American, Delta and National.[14] A year later the Board, without further hearings, authorized a competitive interchange service.[15] This court issued a stay, and thereupon the Board revoked the award and ordered an evidentiary hearing.[16] The board then found that the proposed new service would be hopelessly uneconomic and denied the certificate.[17] One finding of the Board was that:

> "• • • the record now shows that the proposed interchange could not obtain for itself sufficient traffic to meet the expenses of even one daily round trip from the west coast to Miami."[18]

The Board later reexamined its findings, opinion and decision and reaffirmed its conclusions.[19] Thus the Board in 1954 concluded, after extensive evidentiary hearings, that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services.

All the applications consolidated in the *Southern Transcontinental Case* seem to have included the possibility of one or more stops. Nowhere is it made to appear that

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[14] Southern Service to the West Case, 12 C. A. B. 518.

[15] Southern Service to the West Case, 14 C. A. B. 310 (1951); Southern Service to the West Case, 15 C. A. B. 94 (1952).

[16] Southern Service to the West Case, 15 C. A. B. 124.

[17] Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953).

[18] *Id.* at 236.

[19] Southern Service to the West Case, Reopened, 18 C. A. B. 790 (1954).

any such applicant sought only a nonstop certificate, to which service the TWA one-stop service might not be potentially competitive. The comparative circuity of the St. Louis route over the proposed through routes would appear to be no greater than over the existing interchange. If the TWA one-stop service is an effective competitor to the existing interchange to the extent of a 50 per cent diversion of the latter's business (assumed by the Board *arguendo*), it seems to us the TWA service must, *prima facie*, be viewed as a potential competitor to some similar extent of any awardee of a transcontinental route Florida coast to California coast involving one or more stops. And, if the Florida-California business via interchange is enough to support service on only one route, the same business available via one carrier, but with a stop, would appear *prima facie* to be not too much greater. If these things be so, an analysis and evaluation of the available business is necessary, if demanded. To state the matter in other terms, if mutual economic exclusivity is claimed and the claim has a reasonable *prima facie* basis, hearing on the question is required.

The Board submits several answers to the foregoing. In the first place the Board says that the motions for consolidation in the *St. Louis Case* filed by some of the applicants for single-plane, single-carrier service from Florida to California were filed too late. Rule 12(b) of the Board's Rules[20] requires that motions to consolidate must be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. In the circumstances of the present case this is an unrealistic suggestion. Some of these applicants made efforts to have the Board expand the *St. Louis Case* so as to include transcontinental consideration. This the Board refused to do. The Board strictly limited that case to issues relating to St. Louis-Southeastern points service. With the issues

[20] 14 CFR 302.12(b).

thus restricted, counsel for these applicants properly restricted their participation to the presentation of evidence which was relevant to those issues. As a matter of fact the Administrative Procedure Act[21] requires the exclusion of irrelevant evidence. Indeed, as the Board seems to recognize in a footnote (5) to its opinion on reconsideration, the posing of the issue as to restrictions was an indication that the Board would prevent any award in the case from being a transcontinental route—quite the contrary to any indication that transcontinental service was to be the subject of the hearing.

In the second place the Board says that all of these applicants were in fact participants in the *St. Louis Case* and, as such, had an opportunity to present whatever evidence they desired to present. But this suggestion is also unrealistic under the view which we have described as applicable to the timeliness point. The Board says that these applicants were well aware of the implications of the TWA application. They obviously were initially so aware, as is evidenced by their various motions and informal requests at the beginning of the case; but, as we have pointed out, the Board severly restricted the issues to be adjudicated and as to which these parties (as applicants or as intervenors) were permitted to participate.

In the third place the Board says it made findings to the effect that there is no mutual exclusivity between the TWA award and the possible grant or grants of the applications now consolidated in the *Southern Transcontinental Case*. The Board points to certain passages in its two opinions as being findings that there was no mutual exclusivity. It cites to us such passages as that the TWA route "would not in any real sense preclude a finding of public need for a more direct routing," and that the

[21] Sec. 7(c); 60 Stat. 241 (1946), 5 U. S. C. A. §1006(c).

award would not "warrant the assumption that TWA will thereby obtain preferential status in deciding the issues in that case." The Board recited that there is no mutual exclusivity, but the quotations hardly qualify as "findings". They are not based on evidence, and they are not consequent to a hearing on the issue of exclusivity.

The question presently before us is not whether the Board might on some evidence before it conclude that there was no mutual exclusivity; the question is whether the applicants are entitled to a hearing on the issue. Their statutory right is to a hearing before denial of their applications; provided, of course, that the allegations, of fact are sufficient to raise a debatable question. The right to a hearing is the sole question before us.

On this part of the case we hold: (1) The Board had ample authority to limit the *St. Louis-Southeast Case* to considerations pertaining to that area. (2) After the Board had restricted the case to area considerations and had proceeded to the end on that basis, it could not, in that same case, make a transcontinental award. (3) A *prima facie* indication of economic mutual exclusivity between the applications consolidated in the *Southern Transcontinental Case* and the route awarded in the *St. Louis Case* to TWA appears in this record. The case must therefore be remanded.

We do not intimate to the Board what steps it should take upon this remand. Our holding does not necessitate a full evidentiary comparative hearing on all applications for a southern transcontinental route. The Board might, among a number of alternative courses, (1) hold a hearing upon the exclusivity question alone or (2) impose such a restriction upon the route award to TWA via St. Louis as to insure that it would not be an effective competitor with any single plane, single-carrier transcontinental route which might result from the *Southern Transcontinental Case.*

II

As we have indicated, a three-carrier interchange authorizing Florida-California service via New Orleans and Dallas had been licensed in 1951. American argues that the award of a competitive transcontinental service Florida to the West Coast would be a modification of the existing interchange license to which it is a party. We held to the contrary in the *Gerico* case,[22] there concluding that economic damage to an existing licensee is not a modification of the existing license, absent agency rules guaranteeing protection from economic injury.

Petitioners American and Delta also argue that the foreseeable impact of a possible award in the *St. Louis Case* was clearly such as to raise an issue of the public interest in a duplication of services. We have said enough under I, *supra,* to show we agree with that argument. The question required solution by evidence and findings, if a transcontinental award was to be made.

The Board recited its conclusion that the award to TWA was required by the public interest and necessity. But that conclusion was related to a St. Louis-Southeastern-points route. It is entirely true that in making such a finding in a limited-area case the facts of the air transportation system compel consideration of out-of-area factors. We pointed this out in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board.*[23] But that is not our present problem. The problem is the public interest in a competing southern transcontinental service.

The Board makes much of the point that the foreseeable diversion of traffic from the interchange partners is not material to them in the light of their overall resources. The point is immaterial on the question whether these carriers are entitled to a hearing on the possible existence of mutual exclusivity.

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[22] Gerico Investment Co. *v.* Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958).

[23] 104 U. S. App. D. C. 78, 259 F. 2d 808 (1958).

III

We come now to Eastern's contentions respecting it application for an extension of its Route 10 westwar from St. Louis to the West Coast and its application fo an extension from Memphis to Kansas City. The forme controversy concerns the award to TWA and the latte the award to Delta.

Eastern's motion in the St. Louis Case for consolida tion of its pending application for a westward extensio of Route 10 was denied. Eastern contends that with out comparative consideration of its (Eastern's) applica tion the award to TWA of a transcontinental servic virtually identical to that proposed by Eastern violate the latter's rights under *Ashbacker*.

Eastern's application for a westward extension o Route 10 must be considered from two points of view It must be considered from the point of view of th case as a St. Louis-Southeastern-area case, which is wha the Board declared it to be. Then it must be considere from the point of view of a through southern transcont nental route, which is what our petitioners say the Boar considered in fact.

Eastern has a network of certificated routes sprea over the eastern half of the country, with westernmos termini at Chicago, St. Louis, Memphis and San Antoni An extension from St. Louis to the West Coast woul in actual practical fact create for Eastern a Boston-Ne York-West Coast route via St. Louis, as well as Florida-West Coast route. The traffic accumulated by th Boston-St. Louis network is part of the "back-up traffic which the Board says would be fed by Eastern into i new segment St. Louis-West Coast. That the traffic thu picked up in the Northeast would be greater than tha originating in the Southeast seems obvious.

Quite clearly the route sought by Eastern from S Louis westward was not within the area of the case. Al

quite clearly its route Boston-New York-West Coast via St. Louis would not have been a southern transcontinental route. So, if that were all that is involved, no problem would be presented. But, as we have noted, Eastern's requested extension would also connect at St. Louis with its existing St. Louis-Florida-coast route.

We first consider Eastern's application as a part of the *St. Louis Case* as a true area case. Eastern's extension west and TWA's extension east presented different problems in respect to traffic and the area. TWA's extension was physically within the area, and the out-of-area traffic which was involved would flow from existing routes into and through the area over the new segment. This traffic is certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well, as the Board found, be used to provide the base for proper traffic development within the area.

The basic consideration in an area case is, of course, the public interest in and necessity for service in the area. It seems to us that the need of the area for service to traffic coming in from the outside and also the need of the area for service from inside the area to the outside are both proper considerations in an area case. And so the Board can properly take such needs into consideration. But we think the needs of outside traffic, considered as such, are not necessarily pertinent to an area case. Thus, to illustrate, if traffic originating in Seattle wanted very badly to go to Miami, such need, if not linked with some need inside the southeast area, would not be relevant to a southeast area case. The Board could restrict the area case by excluding such wholly outside data.

Eastern's new segment would have been outside the area, and the traffic picked up by it would have been newly picked up for transportation into the area over an existing service in the area. In other words, this application posed the problem of creating in an area service case a new route

outside the area for the purpose, or with the effect, o bringing traffic into the area under consideration. W think the Board cannot be compelled to expand an area cas in that way. We think this situation falls within the powe of judgment vested in the Board to limit these area case We find no error which would require or justify our inte ference in the Board's decision as a limitation upon a tru area case.

We now look at this application of Eastern as part o a southern transcontinental consideration, which, as w have pointed out, is what the Board appears to have unde taken and decided in part in this proceeding. Eastern existing certificate for Route 10 apparently authorize through service St. Louis-Florida coast points. The recor shows, as the Board recites in its Order No. E-13026, tha Eastern actually began the operation of such a throug service St. Louis-Miami nonstop. So Eastern's applicatio for an extension westward from St. Louis would have give it a Florida-West Coast route with one stop at St. Loui The eastward extension awarded TWA was St. Loui Miami via intermediate points Nashville, Atlanta, Tamp and St. Petersburg. So TWA under the award could dupl cate Eastern's existing St. Louis-Florida service, eithe with the stops indicated or nonstop, and the transcont nental route created for TWA by the award is a duplicat of the transcontinental route which would have bee created for Eastern by a grant of its application.

Therefore, looking at the matter from the standpoi of a transcontinental service, Eastern occupies substa tially the same position occupied by the other applicant for transcontinental certificates, discussed by us in I, *supr*

The one factor possibly differentiating Eastern's tran continental application from those of the other applicant in this case is that Eastern's proposed St. Louis-West Coa route would not be merely a southern transcontinental rou but would connect to the West Coast all of Eastern's ne work of routes in the East. It was on this basis, and on

consideration of the potential traffic between St. Louis and points west thereof named in the application, that the Board reached its conclusion of no mutual exclusivity. The direct question as to exclusivity is whether TWA's St. Louis-Florida segment will prevent a grant of Eastern's St. Louis-West Coast segment. These are not two segments over the same route but come into competition one with the other when they are linked up with the respective existing networks. Thus the whole of both carriers' systems seem to be involved. The Board mentioned as a decisive factor the whole of Eastern's potential traffic, given the new award. It did not mention the comparative whole of TWA's potential traffic, given the new award. The Board's reasoning and the bases for its conclusion on this point are by no means clear. It refers to the substantial "back-up" traffic available to Eastern from its entire eastern network and to "these varied traffic sources". This could mean (1) that the Board did consider the whole of the traffic potentialities of both carriers, or (2) that the Board deemed the traffic potential of the single St. Louis-Southeast route awarded TWA as *de minimis* in comparison with the whole of the traffic potentially available to Eastern from the entire southeastern area and the Northeast, or (3) some other meaning not readily discernible. So we are unable to determine whether the Board's action was or was not valid. Upon the remand the Board will make a clearer definition of its conclusion upon this point and the reasons therefor.

The Board contends that Eastern did not avail itself of the opportunity presented to it to offer evidence in support of its claim of exclusivity. The record shows, however, that Eastern, in its petition for reconsideration of the Board Order No. E-13026, did refer to some facts on which it relied to show mutual exclusivity. The Board's reply, with its reference only to traffic available to Eastern, was inadequate. Therefore, despite Eastern's awareness that the issue of mutual exclusivity was open to it during all stages of the hearing, the Board's failure to make the

necessary specific findings deprived Eastern of the f
hearing required by *Delta Air Lines* v. *Civil Aeronaut*
Board.[24]

In sum, as to Eastern and TWA: If the Board p
ceeds with the *St. Louis Case* so restricted as to cons
tute it a true St. Louis-Southeastern points area case,
need not consolidate Eastern's application for the we
ward extension. But, if it proceeds with the case as
practical effect a transcontinental route case, it must ma
adequate findings upon the problem of exclusivity, wh
may or may not involve a further hearing.

The situation of Eastern *vis-a-vis* Delta is that De
applied for and was awarded a new segment Memph
Birmingham, which was within the St. Louis-Southeaste
area and constituted a link in a St. Louis-Florida co
service, whereas Eastern applied for and was denied
new segment Memphis-Kansas City, the latter point bei
well outside the area of the case and this segment bei
no part of a St. Louis-Southeastern service. The questi
is whether Eastern's Memphis-Kansas City application w
required to be consolidated for comparative hearing w
Delta's Memphis-Birmingham application.

Delta already has certificated routes in the St. Lou
Southeastern area. These include routes from St. Lo
to Memphis and from Memphis roundabout to Jacks
Meridian-Birmingham-Atlanta and thence to Miami.
also has a route Kansas City-Memphis. Eastern, as
have noted, already has certificated routes in the
Louis-Southeastern area, among them one Memph
Birmingham-Atlanta and thence to Miami. Eastern ur
that the grant to Delta of the Memphis-Birmingham s
ment creates for Delta a through service Kansas Ci

---

[24] 97 U. S. App. D. C. 46, 228 F. 2d 17 (1955). It is true th
unlike the instant case, the *Delta* case did not involve an applicat
for a new route segment outside the limited area under consid
tion. However, the reasoning of that opinion requires the same k
of hearing in a case such as this, where a *prima facie* showing
made of mutual exclusivity of applications for a particular ro

Florida coast, and that its (Eastern's) application for a segment Kansas City-Memphis would have created for it, *inter alia*, precisely the same through service Kansas City-Florida points. The Board says (1) that consideration of this Eastern application would be an unwarranted expansion of the area case, and further (2) that the mandatory stops required by it to be made by Delta on any single-plane flights Kansas City-Florida points are sufficient to prevent the award from creating a service which would in any degree preclude an eventual grant to Eastern of the Kansas City-Memphis extension, with authority to overfly Memphis.

Eastern's position is, in effect, that the same considerations which apply to the treatment of the transcontinental route problem, as it arose in the *St. Louis Case*, apply likewise to the Kansas City service problem as it arose in that same case. We think they do not. The expansion of an area case by adding a little additional segment outside the area is quite a different thing from awarding a transcontinental certificate in a limited area case. The former is an expansion of a limited case. The latter is a transformation of the real nature of the proceedings. We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment.

Eastern complains that, although the Delta award would not be mutually exclusive with one part of its application, it would preclude the award to Eastern of another part of its application, namely, the identical route, with the same mandatory stops, as that obtained by Delta. Eastern complains that the Board made no finding on this point. This Kansas City-Memphis-Birmingham-Atlanta-Florida route would be one of many combinations of routes available to Eastern from Kansas City to Southeast points. But to consider this one route separately would be to require the dissection of an area case into a number of competing segments and to require comparative consideration of each

pair of parts of applications. We think there is no suc
requirement. Moreover in this contention Eastern spli
its unrestricted application into small sections and urg
that the several sections must be compared with similar
segregated sections of other applications. We think th
Board is not required to do this. Were the law otherwis
the Board would be burdened with a flood of applicatio
and motions, with consequent hearings thereon, filed
airlines whenever a new route was proposed which serv
any point already served by the protesting line. Such
tangle would prevent the Board from performing its stat
tory duty of upholding the public interest by fostering
sound air transportation system.

IV

Eastern contends that the TWA and Delta awards we
not made upon proper findings of public convenience a
necessity based on substantial evidence; that the reco
requires a finding that Eastern could and would satis
all service needs in the St. Louis-Southeast m[illegible]; th
the Board failed to make sufficient findings on the cum
lative diversion of revenue from Eastern because
awards made in this and other cases; that the Boa
failed to make adequate findings of the market potentia
and that TWA was awarded an Atlanta-Florida servi
without any finding of need for such service. We ha
examined the record and find these contentions to
without merit. While it is true that there is some ev
dence to support Eastern's position on certain of the
issues, there is substantial evidence to uphold the ch
lenged findings of the Board. Eastern's basic argumen
concerning the lack of need for the creation of new servi
competitive to Eastern in the St. Louis-Southeast mark
are intimately tied to its contention that the Board err
neously failed to reopen the record to receive new eviden
of Eastern's operations after the commencement of th

hearings. These several contentions of Eastern must be viewed against the background of findings by the examiner and the Board, upon extended evidence, that Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area. Upon the facts of this case, we think the Board did not abuse its discretion in declining to reopen the record.

It is true that the Board did not find any need for the Atlanta-Florida service award to TWA, considered as local service. But it specifically found a need for trunk-line service from St. Louis-Nashville to both Atlanta and Florida. We find no error in the Board's award of the route without an absolute restriction against local service between Atlanta and Florida.[25] The Board did place a long-haul restriction on the Atlanta-Florida segment award to TWA.

Delta, while agreeing with the Board's findings on the need for a new competitive St. Louis-Southeast route, contends that the Board erred in that it awarded the new route to TWA on the basis of a "need" not in issue and failed to make certain comparative findings as to Delta's and TWA's qualifications for the route. Delta attempts to demonstrate that the Board, without so saying, actually picked TWA as the awardee upon a consideration of needs of out-of-area traffic. It says the Board specifically excluded from the issues in the case the service needs of out-of-area traffic, *i.e.*, the needs of cities west and north of St. Louis for service into the Southeast area. Nevertheless, says Delta, the Board based the award to TWA upon such needs. But it clearly appears that the only use the Board made of out-of-area traffic data was as one of the factors in selecting the carrier best able to meet the needs of the area. The Board said:

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[25] It should be noted that Eastern made no request for any such restriction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 777.

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

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April 18, 1960.

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REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

Introduction.

Eastern Air Lines, Inc. ("Eastern"), petitioner herein, hereby replies, under Rule 24 (4), to the briefs filed by American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), and National Airlines, Inc. ("National") in opposition to Eastern's petition for certiorari and, as well, to the Memorandum for the Civil Aeronautics Board ("the Board" or "CAB") in this case which, significantly, does not oppose certiorari.[1] Eastern does not submit a

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[1] Reference to particular portions of those documents filed by those parties will be by abbreviation of their respective names, followed by the page number of the brief (or "memorandum" in the case of the CAB) as, for example, (AAL 1), (DAL 2), (NAL 3), (CAB 4). Reference to Eastern's petition for certiorari will be in similar form as, for example, (EAL 5). References to portions of the Joint Appendix below, certified to this Court, will be comparable, as, for example, (J. A. 6).

detailed, point-by-point rebuttal to the errors in the various documents of other parties, but will confine this reply to a treatment of the principal points (as distinguished from the subsidiary contentions) of the other parties.[1]

The parties devoted the bulk of their answers to the "*Ashbacker*" problem and made, in general, three principal allegations: (1) the decision below rested on the question of "notice" to the parties of the issues in the proceeding before the Board; (2) there is no internal conflict within the decision of the Court below as between its treatment of the Delta and TWA awards; and (3) there is no conflict between circuits on the "*Ashbacker*" issue.

In addition, American asserts (AAL 18-20) that there is another unchallenged ground on which the decision below rests, namely, that there were no proper findings of public convenience and necessity for duplication of existing licenses for southern transcontinental service. Eastern will reply, not because it opposes American's contention,

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[1] It will be recognized that Eastern finds itself in something of an anomalous position with respect to American and National. Eastern concurs in the result reached by the Court below in overturning the award to Trans World Airlines, Inc. ("TWA") and, if certiorari is granted by this Court, will join American and National in asserting the invalidity of the Board's award to TWA. American's and National's opposition is basically to TWA's petition for certiorari in No. 679, of course, but naturally those parties have attacked Eastern's position as a necessary byproduct of their opposition to TWA, since it is expected that if the Court grants certiorari in No. 777 (Eastern's petition), it will necessarily grant certiorari in No. 679 (TWA's petition), and, understandably, American and National do not desire the latter result. Delta stands in the same posture as regards the decision by the Court below on the TWA award (that is, Delta agrees with Eastern, American and National that the Court below reached the proper result on that portion of the case). However, Eastern and Delta are in direct conflict with respect to the decision of the Court below on the award made by the Board to Delta. Eastern contends that that award was invalid, while Delta naturally wishes to support the validity of the award by the Board and to avoid review by this Court of the decision of the Court below sustaining that award.

but because the point raised by American reflects internal inconsistencies within the decision below.

American does not discuss Eastern's assertions that the Board did not make lawfully required findings on public convenience and necessity and that the decision was prejudiced by a "press release" announcing the Board's predeterminations (see AAL 21, n. 32), nor does National discuss those points. Delta alludes to the errors alleged by Eastern with respect to the elements of public convenience and necessity and the Board's press release prejudgment (DAL 23-25). National cites authority for the proposition that certiorari is granted only in cases involving principles the settlement of which is of importance to the public, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeal (NAL 8-10). The Board addresses itself briefly to Eastern's contentions respecting the elements of public convenience and necessity (CAB 11-14) and to Eastern's assertion that the "press release procedure" constitutes error (CAB 14-15).

Eastern briefly replies to the contentions of the parties respecting the "*Ashbacker*" question and to the arguments regarding Eastern's other allegations of error, as follows:

I.

Reply to the arguments raised respecting the "*Ashbacker*" doctrine.

A. Reply to the Contention that the Decision Below Rests upon the Question of Notice.

The argument is made that the ruling of the Court below rests upon an unlawful failure to give the parties adequate notice of the issues in the case.[1] That is to say, it is argued

[1] This appears to be the position of American (AAL 3-4, 16) and of Delta (DAL 3, 6, 7-8, 11-13, 21-22); but *not* of National, which says (correctly, Eastern submits) that the Court ruled that the Board's findings in the proceeding before it established *prima*

that the Court ruled the Board limited the case strictly to an "area" proceeding (the area being between St. Louis and the Southeast) and did not give the parties "notice" that a transcontinental award might result and thus denied a fair hearing to the parties. Accordingly, the decision is not so much an *"Ashbacker"* decision *qua "Ashbacker"*, but is rather a *"notice"* problem. However, none of the parties discussed the proposition that if this be true as to TWA[1] and the West Coast, the *same* must be true as to Delta[2] and Kansas City—in other words, if the Board strictly limited the proceeding to St. Louis-Southeast service, giving no notice that more expanded authority than that could result and accordingly the Board could not lawfully grant TWA a transcontinental route, then surely it was equally unlawful for the Board to grant Delta a Kansas City-Atlanta/Birmingham route in view of the strict limitations of the issues (*no* issues of service *west* of St. Louis or Memphis) and the lack of notice that such expanded authority could result from the proceeding. (It is pertinent, too, that Kansas City lies on TWA's route west of St. Louis and on Delta's route northwest of Memphis, but the through Kansas City-Southeast service award to TWA was

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facie mutual exclusivity (despite the Board's disclaimer of such exclusivity) and, therefore, the decision must be remanded to the Board for appropriate corrective action by it (NAL 4-5, 7). The Board cogently observes that the basis of the Court's decision is unclear (CAB 1) and that while there is some indication that the Court may have decided the case on the question of "notice," such an interpretation is inconsistent with the Court's specific ruling that Eastern had "notice" of mutual exclusivity (CAB 8).

[1] It will be recalled that TWA was awarded a West Coast-Atlanta/Florida route via one stop at St. Louis and the Court below ruled this award was invalid.

[2] Delta was granted a Kansas City-Atlanta/Birmingham route via one stop at Memphis and the Court below ruled that this award was valid. Kansas City was excluded from the area of the case (*e.g.*, J. A. 94) as was the West Coast (J. A. 92-94).

found invalid and the same award to Delta was, inconsistently, found valid.) Eastern submits that a consistent application of the law requires a consistent result on the same facts, *mutatis mutandis*. The failure of the Court below to apply its reasoning (if its reasoning be that of "notice") consistently to the TWA and Delta awards illustrates the confusion in the law of "*Ashbacker*".

B. Reply to the Contention that the Decision of the Court Below is not in Conflict Internally as Between the TWA Award and the Delta Award.

The contention of the parties opposing certiorari at this point appears to be, in essence, that TWA received an "effective" transcontinental award, which was unlawful since the proceeding was strictly limited to a St. Louis-Southeast proceeding and there was no notice that more expanded authority could result. But, by contrast, it is argued the Delta award was so restricted that Delta could not offer an "effective" Kansas City-*Florida* service.[1] This alleged distinction, by confusing the point urged by Eastern with respect to the Delta award, simply glosses over the fact that the approach by the Court below to the Delta award directly contradicts its disposition of the TWA award. No party has denied that Delta was awarded an effective Kansas City-*Birmingham/Atlanta* route, via one stop at Memphis.[2] That is precisely what Eastern is

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[1] This is the interpretation of American (AAL 8-9) and National (NAL 12-13), but seemingly not of Delta, whose position is not at all clear, but seems to correspond to that of the Board as set out below. See (DAL 20-21).

[2] Delta presently offers through-plane service between Atlanta and Birmingham on the one hand, and Kansas City on the other via Memphis (*Official Airline Guide*, April 1960). (*Cf.* AAL 9, nn. 7, 8; provision of through-plane service shows effective route, while lack of through-plane service shows lack of effective route).

complaining about: the Board granted Delta an effective Kansas City-*Atlanta/Birmingham* route without affording Eastern any hearing on its application to provide *exactly* the same services that were possible to Delta, subject to precisely the same restriction imposed on Delta. The Delta award is in exactly the same posture as the TWA award: if it was wrong for the Board to grant TWA an effective Atlanta-Kansas City and San Francisco route, by way of one stop at St. Louis, without granting comparative hearings to competing applicants, surely it was equally wrong to grant Delta an effective Atlanta-Kansas City route via one stop at Memphis.

The Board does not rely on the alleged distinction between "effective" and "ineffective" awards, rather it says that there were several possible routings inherent in the Eastern application and there is nothing wrong with infringing Eastern's right to a hearing on some of several possible routings since there might be a prospect for obtaining *another* routing in another proceeding by virtue of that application (CAB 10-11).[1]

There appear to be two defects in that position.

First, application of the Board's view could completely dissipate the effectiveness of the *"Ashbacker"* doctrine. By holding a series of hearings limited to only *one* or *two* of several possible routings inherent in the Eastern application, and each time denying Eastern comparative consideration on the ground that *the totality* of Eastern's application was not concerned with the proceeding, the Board could, bit by bit, grant authority (sought by Eastern) to other carriers without ever giving Eastern *any* hearing on *any part* of its application. Put another way, the Board

[1] Delta's interpretation appears to be somewhat similar, see above at 5, note 1.

could give the entire pie, piece by piece, to other parties until all of it was given away without allowing Eastern to have a chance at the whole pie or at any part of it. We do not believe the Supreme Court, or any of the lower tribunals would condone such a device to deprive Eastern of its right to its day in Court.

Secondly, the Board's assertion that it is not required to consider the various "portions" of Eastern's application, is diametrically opposed to what the Court below said with regard to the route awarded TWA. The Court noted (at B16-B20, and especially at B18-B20)[1] that there were several route possibilities inherent in Eastern's St. Louis-West Coast application. *But* the Court held that the Board must consider *each* of the various possibilities and consider whether TWA's West Coast-St. Louis-Florida segment would prevent a grant of Eastern's Florida-St. Louis-West Coast application. That is precisely what Eastern believes the Court should have stated logically and consistently with respect to the Delta award, namely, grant of Kansas City-Atlanta/Birmingham authority to Delta would preclude grant of Eastern's Kansas City-Atlanta/Birmingham application.

Viewed from any aspect,[2] the Court's ruling on the Delta award is inconsistent with its ruling on the TWA award.

C. Reply to the Argument that There is no Conflict Between Circuits.

The three airline parties' contention that there is no conflict between the decision of the Court below and the decision of the Second Circuit Court of Appeals in *Eastern*

[1] References to the decision of the Court below are to the printing of that decision attached to Eastern's Petition as Appendix B.

[2] Including the "notice" perspective, see 3-5, above.

Air Lines, Inc. v. *Civil Aeronautics Board*, 271 F. 2d 752 (2d Cir. 1959), appears to rest upon an erroneous and misleading statement of the facts. Briefly stated, American, Delta and National assert that the Court below ruled that Eastern had made a *prima facie* showing of mutual exclusivity in the *St. Louis Case* and, therefore, should receive appropriate protective action from the Board, but they contend that the Second Circuit held Eastern had not presented evidence in support of its claim of mutual exclusivity in the *Great Lakes Case* and, therefore, the Board was not required to make findings on the issue.[1] American and Delta even pointed out that the Court below had before it the decision of the Second Circuit and, therefore, the Court below saw no conflict.[2] That contention is materially misleading.[3] Exactly the same factual situations appeared in the two proceedings before the Board and Eastern made exactly the same showing of (and the same requests for appropriate findings on) mutual exclusivity in both cases, *mutatis mutandis*.[4] This matter is set out at page 23 of

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[1] (AAL 17 n. 22), (DAL 18-19), (NAL 11).

[2] (AAL 17-18); (DAL 19).

[3] By contrast, the Board tacitly concedes that to all intents and purposes there *is* a conflict between the two decisions, but that if the decision below "rests on the notice point" (*cf.* Part I.A. above, and especially page 3, note 1) there is no "necessary" conflict (CAB 9-10). Candidly, Eastern does not understand the Board's attempted reconciliation of the cases, nor its explanation how "the problem can be resolved" (CAB 10).

[4] Delta suggests (DAL 18-19) that the *Great Lakes Case* and the *St. Louis Case* were dissimilar proceedings before the Board. This appears to be the first time that Delta has suggested that the cases are not identical in principle for all practical purposes. Delta errs. The *Great Lakes Case* was an area case considering issues of service between points in the Midwest and points in the Southeast, while the *St. Louis Case* was an area case considering service between St. Louis and the Southeast. Both were typical "area" proceedings.

The Board's order deferring decision in the *St. Louis Case* for contemporaneous decision with the *Great Lakes Case* (J. A. 409-11)

Eastern's petition herein and pages 21-22 of Eastern's petition for certiorari in No. 785, and need not be repeated. However, Eastern respectfully requests that this Court compare Eastern's petition for reconsideration presented to the Board in the *St. Louis Case* (appearing at J. A. 618-19 in this case) with Eastern's petition for reconsideration presented to the Board in the *Great Lakes Case*

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is replete with observations as to the similarity of the cases, and to the "close relationship exist[ing] between the two proceedings" (J. A. 410) and demonstrates that the Board considered them to be on the same footing, as did, Eastern submits, all parties (including Delta) to the proceedings before the Board. Particularly are they identical with respect to the "beyond-area" mutual exclusivity problems. An illustration of that similarity is found in the first consolidation order issued by the Board in the *St. Louis Case* (J. A. 89-99) where the Board stated, with respect to the situation posed by applications contemplating service beyond the area of the case:

> "The situation here presented by the beyond terminal aspects with respect to St. Louis is similar to that which was presented in the *New York-Chicago Case*, Docket No. 986 *et al.*, decided November 14, 1955, and the *Great Lakes-Southeast Service Case*, Docket No. 2396 *et al.*, Order No. E-9734, wherein the Board adopted a mandatory stop requirement as an appropriate limitation" (J.A. 93).

Nothing could be more apparent than that the Board considered the *St. Louis* and *Great Lakes Cases* as parallel, and, indeed, companion proceedings. The material just quoted followed a discussion as to the scope of the proceeding and the Board manifestly thought that the *St. Louis Case* should stand in the same posture as the *Great Lakes Case*. The situation presented by Eastern's excluded applications is the same in each case, *mutatis mutandis*. In the *Great Lakes Case*, Northwest was awarded a West Coast-Atlanta/Florida route via one stop at Chicago—authority sought by Eastern in an application that was not included in the proceeding. In the *St. Louis Case*, TWA was awarded a West Coast-Atlanta/Florida route via one stop at St. Louis—authority sought by Eastern in an application that was not included in the proceeding. Precisely the same sort of facts were adduced in both proceedings before the Board, and identical errors were charged on appeal to the respective Courts of Appeal. However, the Court below reversed the TWA award, while the Second Circuit upheld the Northwest award. Delta's allegation that there is a difference between the two proceedings is plainly erroneous; the facts are the same but the conclusions reached by the reviewing Courts are different.

(appearing at pp. 1438a-39a in the joint appendix before the Second Circuit, certified to this Court in No. 785). Eastern made exactly the same showing in both cases but the two Circuits went in diametrically opposite directions. The Court of Appeals for the District of Columbia had the opinion of the Second Circuit in its records, to be sure, but it did not have the Joint Appendix of that Court before it, and could not know that the Second Circuit did not give Eastern's petition for reconsideration in the *Great Lakes Case* the same importance ascribed by the Court below to Eastern's identical petition for reconsideration in the *St. Louis Case* when it held that Eastern, in its petition for reconsideration in *St. Louis,* showed facts establishing *prima facie* mutual exclusivity (B19-B20). While the failure of the Court below expressly to recognize the conflict of its decision with that of the Second Circuit is understandable and excusable, the efforts of American, Delta and National to perpetuate that error are an unjustified imposition both upon Eastern and upon this Court.

Passing from the conflict between the District of Columbia Circuit and the Second Circuit, no party has reconciled the decision of the Court below with the opinion of the same Court in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F. 2d 607 (D. C. Cir. 1956), where the Court of Appeals said, in dicta, that *"Ashbacker"* would *not* apply to the expansion of a limited case to a transcontinental proceeding, while in the opinion below it held that *"Ashbacker" would* apply when a limited area case was expanded into a transcontinental proceeding (as in case of the TWA award). Eastern inferred, from the dicta in the 1956 *Eastern* case, that *"Ashbacker" would* be applicable where there was a *limited* expansion outside the "area" of the case since no major expansion of the area would be involved. But in the decision of the Court below

(on the Delta award), some three years later, Eastern discovered that "*Ashbacker*" apparently would *not* apply where only a small segment outside the area was involved (see B21), but would apply when an area case would become a transcontinental case. Thus litigants in air route proceedings are faced with total frustration—the Board can refuse to consolidate a transcontinental application into an area proceeding relying on the 1956 *Eastern* case dicta, and refuse to consolidate an application for a short extension outside the area on authority of the 1959 decision below. Therefore, "*Ashbacker*" would be emasculated by the two decisions (see, also, EAL 22-23).

II.

Reply to answers regarding elements of public convenience and necessity.

Although the Board (CAB 11-14) and Delta (DAL 23-24) assert that findings were made on the basic elements of public convenience and necessity to support the awards to Delta and TWA, it is apparent from those contentions that it is in the public interest for this Court to consider the requirements for valid findings of public convenience and necessity.

The Court below upheld the *conclusion* of the Board made without factual findings, that the routes awarded to TWA and Delta were required by the public convenience and necessity. The language of the Court below is irreconcilable with that of a statutory three-judge District Court in *Clarke* v. *United States*, 101 F. Supp. 587 (D. D. C. 1951), where the Court said:

> "The Commission is the final arbiter of the public interest and the function of a reviewing court is limi-

ted. At the same time, as the Supreme Court said in Interstate Commerce Commission *v.* Parker, the ultimate finding of public convenience and necessity must be based upon the proper statutory criteria and must have had the necessary factual findings to support it. . . . As the Supreme Court has said many times, we cannot exercise even our limited power of review unless the findings of fact are adequate to indicate that the Commission did consider these criteria which the law requires.

"In the record before us there are repeated references which indicate that there is not enough traffic over the routes here involved to *maintain efficiently* two carriers. *But the Commission made no finding one way or the other on that point. . . .*" (101 F. Supp. at 593-94, emphasis supplied).

Elsewhere in *Clarke* v. *United States, supra,* the Court said,

"discussion of the controversy should proceed from certain basic principles of public utility regulatory law. The first such principle is that, if there be traffic enough for only one carrier, only one carrier will be certificated. The public interest in that situation is for service. Only if there be *traffic enough to support efficient operations by more than one carrier does the public interest require the competitive operations of two carriers.*" (101 F. Supp. at 590, emphasis supplied.)

Eastern does not, as the Board asserts (CAB 12) allege that "precise dollar and cents forecasts" must be made by the Board to determine whether or not competition is economically feasible. Eastern maintains only that there must be *some* evaluation of revenues and traffic against expenses and capacity (based upon reliable and probative evidence) with lawful findings on the matter of whether

two (or more) carriers can be supported. The Board alleges that it was "found" in the proceedings before the Board that "the record amply demonstrates that the operations of a second carrier can be economically supported without adverse effect on existing carriers" (CAB 12). But nowhere are there any findings of fact to support that ultimate conclusion. The Board might equally well have said the record amply demonstrated that the operations of a second carrier *cannot* be economically supported, and there would be absolutely no method available to test that bald conclusion. Whether or not the record actually demonstrates what the Board in the proceedings before it said it demonstrates could be determined only if the Board actually made findings of essential basic facts. A mere recitation of what the parties alleged is insufficient; that is merely summation of the evidence. Basic findings on essential issues of *fact* are necessary and were not made.[1]

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[1] The Board asserts (CAB 12, 12 n. 8) that the Board took into account the estimates submitted by the parties in the proceeding, and that the Board "found" that the operations of a second carrier could be economically supported between St. Louis and the Southeast. The Board does not say where the parties' estimates were taken into account by the Board and, so far as Eastern can determine, the only instances that may be found are in the Examiner's *recitation of the evidence submitted by the parties* (see J. A. 325-67, headed "Proposals of the Applicants"). While the Board asserts that the Examiner "generally accepted" Delta's traffic estimates, it is important to note that the Examiner recommended *National* and not TWA for the route in question (J. A. 396) and, moreover, he noted that Delta's estimate was optimistic and, finally, he was considering only possible diversion from Eastern and not any balancing of revenues and traffic against expenses and capacity offered to determine whether the public convenience and necessity required another carrier (J. A. 381). There is absolutely no justification for the Board's contention (CAB 13, n. 8) that the "various cost and revenue estimates of the applicant, including those of TWA (J. A. 351-357), . . . obviously were accepted as being within the zone of reasonableness." The Examiner made no such findings nor gave any indication that he agreed or disagreed with the TWA forecasts. A comparison of Delta's revenue and expense estimates (J. A. 334) with TWA's estimates (J. A. 353) reflects great divergence of

III.

Reply to answers regarding the press release procedure.

The thrust of Delta's (DAL 24-25) and the Board's (CAB 14-15) arguments is that the press release is not the "final decision" of the Board.[1] In support of that contention, each party points to only one case, the *Seven States Area Investigation*, CAB Docket 7454 *et al.*, Order E-13254 (Dec. 8, 1958), of all the major Board proceedings that have been decided by press release (41 as of May, 1959, see EAL 26) since the procedure was instituted in August, 1956 to prevent "leaks" by untrustworthy persons participating in the decisional process. It is significant to note that not only is the *Seven States Case* hardly more than two percent of the cases that have been so decided,[2] but that the disparity between the decision of the Board in *Seven States* as announced by press release and the decision promulgated in the formalized opinion (CAB Order E-13254, Dec. 8, 1958) is actually insignificant and involved less than two percent of the route mileage awarded in that

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approaches. Delta's forecast revenues and expenses were more than twice as great as those predicted by TWA, and Delta's operating income was some 2½ times the profit forecast by TWA. While the Board correctly states that with respect to the route Delta was ultimately awarded there were certain costs and traffic estimates submitted by that carrier, *nowhere* did either the Examiner or the Board make any findings as to the validity or reliability of those estimates.

[1] Delta says (DAL 25) there is no conflict between the decision of the Court below and the views of the Second Circuit in *Eastern*; to the extent the Court below might have approved the practice *sub silentio*, its views conflict with the disapproval voiced by the Second Circuit (see EAL 29-30).

[2] Actually less than two percent, inasmuch as additional cases have been decided by press release since May of 1959.

case. The *Seven States Case* resulted in a general realignment of the local service air traffic pattern in the Great Plains region of the United States and the change between press release decision and formalized decision involved only minor and almost inconsequential segments.

The very slenderness of the reed on which Delta and the Board lean serves to emphasize that, for *all* practical purposes, the "press release" *is* the decision.

IV.

Reply to Miscellaneous Matters.

American asserts (AAL 18-19) that the decision below rests upon an independent unchallenged ground, namely that the Board's award to TWA would duplicate an existing license (*i.e.*, transcontinental interchange authorizations) without any proper finding of public convenience and necessity to support the duplicating license. Eastern expresses no opinion on the validity of this claim. However, if American is right, then the Delta award should be reversed as well, since Delta was authorized to duplicate an existing one-stop Kansas City-Atlanta service (the interchange service long operated by Eastern and Braniff by way of one stop at St. Louis) without any findings having been made by the Board that the public convenience and necessity required such duplication. Another internal inconsistency in the decision below is thus exposed.

Eastern does not take issue with National's exposition of the law as contained in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 453 (1951), rather, Eastern's petition meets all the criteria of that case. No one has ever suggested that the problems presented by Eastern's petition are anything less than of the utmost

importance to the public as distinguished from the parties to the case. Indeed, it has come to Eastern's attention since filing its petition for certiorari that both the Board's "press release" procedure and the adequacy of the Board's findings upon the basic elements of the public convenience and necessity have recently been called into question in the District of Columbia Circuit. *United Air Lines, Inc. et al. v. Civil Aeronautics Board, et al.*, No. 15414 *et al.* D. C. Cir. 1960 (see, *e.g.*, Petitioner United's Brief, pp. i [on the press release question], and ii, 32-39 [on the inadequacy of findings question]). It thus appears that increasing litigation will arise charging those errors unless this Court defines the law.

It has already been demonstrated that confusion and conflict exist between the circuits on the application of *Ashbacker*, and the Board has found itself in such a quandary about what to do about *Ashbacker* situations[1] that on March 25, 1960, it asked Congress to enact legislation "to clarify the powers of the Civil Aeronautics Board in respect

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[1] American has asserted (AAL 12, n. 12) that the Board applies *Ashbacker* to proceedings before it, and cites in support of that contention the Board's decision in the *Southeastern Area Local Service Case*, Docket 7038 *et al.*, Order E-14754 (Dec. 18, 1959). That order is an excellent example of the confusion of the Board in approaching *Ashbacker*. True enough, the Board did make certain findings on one "*Ashbacker*" situation that was there presented, but it refused to make timely requested findings of fact on an *Ashbacker* situation presented by Eastern, which had sought consolidated hearing and decision in that proceeding on an application (Docket 8529) seeking a route identical to a route that was awarded another carrier. Eastern repeatedly sought contemporaneous consideration of its application, and asked for proper factual findings on the mutual exclusivity issue, but the Board emphasized in the order cited by American its refusal to make such findings (see, *e.g.* CAB Order E-14754, p. 59, n. 77). The order referred to by American simply corroborates the fact that the Board sometimes applies *Ashbacker* and sometimes does not. (Eastern has sought reconsideration of that order, pointing out that the Board's own findings show mutual exclusivity but the Board has not yet issued its order upon reconsideration.)

of consolidation of certain proceedings" (Letter from Chairman Durfee of the Civil Aeronautics Board to Richard M. Nixon, President of the Senate, March 25, 1960). The "Statement of Purpose and Need for Proposed Legislation" accompanying the draft bill includes the following language:

> "One of the most persistent problems the Board has encountered, particularly in large area route proceedings, has been the contention of applicants at the consolidation stage, based on the doctrine of *Ashbacker Radio Corp.* v. *F. C. C.* (326 U. S. 327 (1945)), that they are entitled as a matter of legal right to consolidation of particular applications. . . . In many instances in the past, a refusal by the Board to consolidate has resulted in an appeal to the courts from the consolidation order, with a request that the court stay further procedural steps in the Board proceeding pending disposition of the petition for review. . . .
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> "It is believed that legislation is needed which will (1) recognize the Board's right, in its sound discretion, to hear particular applications individually or in conjunction with others, . . . and (4) provide that the burden of establishing that applications should be consolidated for hearing or given contemporaneous consideration shall be on the person making request therefor" (*Congressional Record* 6872, Apr. 6, 1960).

Thus it would appear that the Board recognizes that the law now requires it to grant consolidated hearing on applications that are alleged to be mutually exclusive of applications the Board proposes to hear in a pending proceeding, and also that the burden of establishing mutual exclusivity is *not* on the person asserting mutual exclusivity, but upon

the person prosecuting an application and alleging that no mutual exclusivity exists. However, the Board in the case below, and in its pleadings in this Court, is asserting the contrary; if the Board felt the matter were free from doubt and in favor of its position in this case in this Court, obviously it would not feel any need for the legislation that it has requested less than two weeks ago.

Conclusion.

WHEREFORE, Eastern respectfully prays that the Answers of the other parties hereto be denied and that a writ of certiorari issue.

Respectfully submitted,

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Atlanta, Georgia
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